MAINE CONSTRUCTION GENERAL PERMIT
RESPONSE TO COMMENTS

This document is organized by the major sections ("Parts") of the Maine Construction General Permit (MCGP). When a comment did not specify the part of the MCGP being addressed, the comment has been included under the Part that appeared most applicable. A section including general comments appears at the end of the comments. In some cases, the same or closely related comments from more than one person have been summarized in a single comment section. In some cases, comments addressed possible statutory changes or other issues outside the scope of this general permit. This document does not respond to those comments.

The Department also identified some clarifications that were necessary. These appear at the end of the document.

"Department" or "DEP" refers to the Maine Department of Environmental Protection. "EPA" refers to the federal Environmental Protection Agency. "MCGP" refers to the Maine Construction General Permit.

The Department made both "Construction" and "MS4" draft general permits available for public comment at the same time. In some cases, it was not clear to which permit a comment was directed. In this case, the Department has attempted to address the comment in the context of both types of permits.

The Department requested that the Attorney General's Office review the MCGP for legal sufficiency, and EPA reviewed the MCGP for conformance with its requirements.

This document does not describe minor formatting and numbering changes, or changes to headings. A copy of the public comment draft, showing changes made in underline/strike, is in the appendix.

Contents

PART I -- General Permit Coverage

Comment. The MCGP is clearly intended for "direct discharges" of stormwater (Part I(A), first sentence, and part I(B). Is it correct to say that indirect discharges, i.e., non-point source discharges cannot obtain coverage via the MCGP? (3)

Response. The MCGP authorizes certain direct discharges of stormwater. A discharge that is not a direct discharge (point source) may not obtain coverage under this permit. "Direct discharge" and "point source" are specifically defined in statute and rule, [1] and have the same definition. "Non-point source" is somewhat less well defined. Commonly, over many years under a number of other of Maine's programs, stormwater discharges of all types have been referred to as "non-point source" discharges. In order to avoid confusion, this term was not commonly used in the MCGP. The important distinction for purposes of the MCGP is that a discharge is either a direct discharge (point source) or it is not.

Comment. The language that the general permit authorizes the specified discharges so long as they meet the requirements of the MCGP "and applicable provisions of Maine's waste discharge and classification statutes and rules" is confusing. The additional reference leaves the regulated community to wonder what, in addition to compliance with the general permit terms, they must do to be in compliance. (10) The text should be eliminated because it is not reflected in the specific provisions contained in the submissions requirements and thus will raise (rather than resolve) questions regarding the applicability and requirements of the CGP. (14)

Response. The Department issues permits pursuant to statutory materials, some of which have fairly extensive provisions and several chapters of associated rules. It is not possible or desirable to repeat all this material in each permit, and the Department cannot waive such statutory and regulatory requirements in the permit. As a practical matter, the typical applicant rarely needs to reference the underlying material. However, it is appropriate for the Department to cite to this material, and to make it available if an applicant requests it. This material is also available at DEP's website on the internet.

Comment. The first sentence should read: "This general permit authorizes the direct discharge of stormwater associated with construction activity to waters of the state other than groundwater, provided that the discharge meets the requirements of this general permit." (14)

Response. In the text quoted, the writer has removed the clause "or to a conveyance leading to such waters" that appeared in the draft. The Department has removed this clause, as it is duplicative.

Comment. The authority of the CGP is the federal Clean Water Act and EPA's delegation of NPDES to the State. The remaining language in this subsection is unnecessary and confusing and sets out a significant change in Maine's regulatory approach to stormwater discharges. (14)

Response. The language the comment is addressing appears to be the following:

> Nothing in this general permit is intended to limit the Department's authority under the waste discharge and water classification statutes and rules. This general permit does not affect requirements under other applicable Maine statutes such as the Site Location of Development (Site Law), Stormwater Management, Land Use Regulation Commission (LURC), and Natural Resources Protection (NRPA).
>
> This general permit does not prevent a municipality from adopting stricter standards than contained in this general permit, or in state or federal law.

[1] 38 MRSA § 466(5) (definition of "direct discharge") and 06-096 CMR 520 (definition of "point source").

The MCGP is adopted pursuant to Maine law (38 MRSA 413), not federal law. The text above is correct and has been retained. It does not represent a change in Maine's regulatory approach.

PART II -- Definitions

Comment (disturbed area). The definition of "disturbed area" expressly excludes redevelopment and defines "routine maintenance" to include only maintenance that is performed to maintain the original purpose of the facility. For clarity, this definition should be revised to explain that only redevelopment or maintenance that involves ground disturbing activities would be covered under the permit; a simple change of use of an existing facility to a different use that does not involve ground disturbance would not require coverage under the MCGP. (10)

Response. The premise of this comment is not correct. The definition of "disturbed area" expressly *includes* redevelopment. The definition in the draft posted for public comment provided:

> **E. Disturbed area**. "Disturbed area" is clearing, grading and excavation.[2] Mere cutting of trees, without grubbing, stump removal, disturbance or exposure of soil is not considered "disturbed area". "Disturbed area" does not include routine maintenance of an impervious area within the footprint of that impervious area, but does include redevelopment. "Routine maintenance" is maintenance performed to maintain the original line and grade, hydraulic capacity, and original purpose of the facility.

The term being defined is "disturbed area", and the basic definition is "clearing, grading and excavation". The remaining parts of the definition clarify and relate back to that basic definition. Therefore, it is not considered necessary to add that redevelopment and maintenance must include "ground disturbing activities", and doing so would make the definition longer and more cumbersome. Note that the exemption for routine maintenance is consistent with the approach used by the Department for many years under the Site Law and Stormwater Management Law, and is not a new concept for much of the regulated community.

Comment (disturbed area). The use of the word "routine" is confusing and potentially limiting. For example, if there is a major storm event or unanticipated occurrence such as an accident which causes damage, property owners should be encouraged to inspect and if necessary maintain the project and stormwater systems. It is not clear that such maintenance would be exempt. It seems clear that such maintenance is environmentally desirable and therefore should be exempt, so that property owners do not have to wait 14 days for the NOI to undertake this maintenance. Similarly, the maintenance should not be limited to the impervious footprint but should also include the stormwater control systems. Thus if a tree blows down in a storm and damages a stormwater control system the property owners should be able to repair the system.

The re-use of the site should be allowed without review if there are not significant changes to the site. For example, CGP should not be required if a building is converted from retail space to office space. Thus the use of the word redevelopment seems overly broad. Suggested rewrite:

> "Disturbed area" is clearing, grading, and excavation. Mere cutting of trees without grubbing, stump removal, disturbance or exposure of soils is not considered "disturbed areas". "Disturbed area" does not include maintenance/repair of an impervious area within the footprint of that impervious area or maintenance/repair of stormwater control

[2] See 06-096 CMR 521(9)(b)(14)(x) and 40 CFR 122.26(b)(15).

> systems. "Maintenance" is the "maintenance/repair performance to maintain the original line and grade, hydraulic capacity and original purpose and function of the original facility and/or system. An area is disturbed if the character of the impervious area is significantly changed. Note: The conversion of a parking lot into a structure is an example of a significant change to the character of an impervious area while the change of use of a building from retail to office is not.

(14)

The term "routine" should be deleted from the definition of "maintenance". It does not add to the definition and is confusing in that it is susceptible to variable interpretation. (12)

Response. The approach taken to routine maintenance in the draft is consistent with that used for many years by the Department under both the Site Law and the Stormwater Management Law. Damage from a large storm is not excluded from the definition of "routine maintenance". Adding concepts such as "conversion" and "significantly changed" create unnecessary ambiguous areas in the definition and would make it less clear when this definition applied. Therefore, these suggested changes have not been made.

However, although the Department considers it very unlikely that maintenance of a stormwater system, such as from a tree fall, would make it necessary to disturb one acre or more of ground, it is possible that some non-impervious area may need to be maintained and should therefore also be exempted. For example, a buffer or ditch lining may need to be repaired. Therefore, the changes indicated in the second sentence below have been made, effectively expanding the exemption for routine maintenance.

> "Disturbed area" does not include routine maintenance ~~of an impervious area within the footprint of that impervious area~~, but does include redevelopment. "Routine maintenance" is maintenance performed to maintain the original line and grade, hydraulic capacity, and original purpose of the facility.

Comment (impaired waterbody (C)). We take issue with the "impaired waterbody" term because it creates a third list of waters in non-attainment. First list is the 303(d) reporting to EPA, the second list is Chapter 502, now there may be a Construction General Permit list. A reasonable expectation would be to have the impaired waterbody list match the 303(d) list. (3)

Response. Impaired waterbodies (the 303(d) list) are those waterbodies known to not be meeting water quality standards. The Construction General Permit list of "impaired waterbodies (C)" is a subset of waters listed on the 303(d) impaired waters list. "C" stands for "construction. Although it would be simpler to have the two lists match, it would also result in greater costs to the regulated community, without a significant gain in environmental protection.

The Construction General Permit list was created by reviewing categories of waterbodies on the 303(d) list. Some waterbodies that were on the 303(d) list were not included on the Construction General Permit list. The Department did not include streams that were only impaired by bacteria violations (5-B), atmospheric deposition (5-C) or legacy pollutants (5-D). The Department did not include streams impaired by point sources where existing pollution control requirements could reasonably be expected to result in attainment (4-B-1), the combined sewer overflow streams (4-B-2), or the streams where the impairment was not caused by a pollutant (mostly hydro 4-C). The department <u>did</u> include all impaired streams with completed TMDL (4-A) and all impaired streams with TMDL required (5-A) except for those streams where (1) the nature and cause of the impairment was unrelated to stormwater and (2) there was no reason to think that a

higher level of stormwater or erosion control would in any way effect the level of impairment or future opportunities for attainment. Some examples of streams and rivers that were not included were large, main stem rivers with non stormwater-related point source impairments and streams impaired only by aquaculture discharges. This resulted in the removal of one out of five streams from the TMDL completed list, and 20 out of 90 streams from the TMDL required list.

Note that the Chapter 502 list is not solely a list of impaired waterbodies. The Legislature required that this list contains waterbodies "most at risk from new development" and waterbodies "in sensitive or threatened geographic regions or watersheds." This list is intended to include waterbodies that are expected to become impaired unless preventive measures are taken.

Comment. Maine law requires that designation of any waterbody as impaired can only be achieved through adoption of a rule designating a waterbody as impaired and subsequent adoption by the Legislature. 38 MRSA 465(5). Thus, the provisions on impaired waters should only apply to named waterbodies when and if the waterbodies are designated in accordance with 38 MRSA 464(5). (14) (10)

Response. The Department does not agree that 38 MRSA 465(5) requires designation of an impaired waterbody through rulemaking. Some background may be helpful.

The 303(d) list is a list of impaired waters that States must compile, with review and approval of the U.S. Environmental Protection Agency, pursuant to the Federal Water Pollution Control Act. 33 U.S.C. 1313(d). The list includes waters within the State that do not currently meet, and in some cases, are not expected in the next four years to meet, water quality standards, notwithstanding the application of effluent limitation on point sources. 40 C.F.R. §130.25. The list is compiled by the State using all existing and readily available water quality-related data and information. The list must be posted for public comment when the State initially compiles the list. If EPA proposes changes, the list must again be made available for public comment. See 40 C.F.R. §§130.34 and 130.36.

A “rule” is defined in the Maine Administrative Procedures Act as “the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability … that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.” 5 M.R.S.A. §8002. The 303(d) list is not “a regulation, standard, code, statement of policy or other agency statement of general applicability.” It is a list of waters that, as a matter of fact, do not meet the State’s water quality standards. Nor is the list, in and of itself, “judicially enforceable,” although it may have legal effect through operation of statutory or regulatory provisions (e.g. 38 M.R.S.A. §464 (the Department may not issue a discharge license for a project affecting a water body in which the standards of classification are not met if the project will cause or contribute to the violation)).

The statutory section (464) cited in the comment requires the Board of Environmental Protection (BEP) to promulgate rules necessary to implement the water quality classification system, including but not limited to, sampling and analytical methods, protocols and procedures for satisfying water quality criteria, including evaluation of the impact of any discharge on the resident biological community. It does not mention the "impaired waters" list, or something similar, except in one narrow context.

Title 38 MRSA 464(3) provides that:

> The commissioner shall submit to the first regular session of each Legislature a report on the quality of the State's waters which describes existing water quality, identifies waters that are not attaining their classification and states what measures are necessary for the attainment of the standards of their classification.

The Department typically includes the 303(d) list as part of this report to the Legislature. The Legislature has never required that this report go through rulemaking.

Although rulemaking on the 303(d) is list is not appropriate, the Department made the draft Construction General Permit list available with the draft MCGP. No comments on the specific waterbodies listed were received. The Department has incorporated the list into the MCGP. Certain columns were dropped to simplify the list, and a column with town names was added to the lake list, to help the public identify the lakes.

1. **Construction General Permit List.** The list of the impaired waterbodies (C) ~~is determined by the Department and is available in hardcopy and on the web at:~~ is in Appendix D.

   ~~http://www.state.me.us/dep/blwq/docstand/stormwater/construction.htm~~
   ~~This annually updated list is made available for public comment prior to becoming effective.~~

A note has also been added to the list in Appendix D providing information concerning the existing statutory and regulatory mechanisms that could result in a change to the list within the MCGP. In most cases, the list would be updated upon re-issuance of the permit, but the Department also has authority to reopen the permit and change the list. If the Department required an individual permit for a project, all best available data would be considered, including data provided by the applicant. This approach is consistent with existing licensing procedures for updating and revising permit conditions.

A paragraph at the end of Part IV(A) has been deleted. It described the process for submitting an ESC plan if a waterbody was determined to be impaired outside of the MCGP. Since this list is now part of the MCGP, such language is no longer necessary, but could be incorporated if the permit were reopened or reissued.

> ~~If the construction activity discharges directly to a waterbody that is determined by the Department to be impaired after authorization of the discharge, the Department may require the submission of an erosion and sedimentation control plan (ESC plan) to the Department for review and approval. The plan must address remaining construction activity (areas not yet permanently stabilized). The plan must be submitted within 30 days of notification to the permittee, as part of appropriate controls and implementation procedures to bring the discharge into compliance with this general permit. If the Department does not approve or deny the ESC plan within 30 days of when the plan is received, then the plan is deemed approved by the Department. This submission requirement does not apply if the permittee has already submitted an ESC plan to the Department and no substantial change in the activity has occurred.~~

Comment. The definition of impaired waterbody should be revised as follows: An impaired waterbody means a waterbody that is not attaining its designated water quality classification and has been designated as impaired pursuant to the provisions of 38 MRSA § 465(5). The remainder of this section [Part II(F), definition of "impaired waterbody C"] denies the property owner due

process, may rise to the level of a taking, and is in conflict with the requirements of state and federal law. (14)

Response. As explained in a previous response, 38 MRSA 465(5) does not impose requirements concerning the 303(d) impaired waters list. The suggested revision has not been made. The proposed MCGP does not result in a taking, and is consistent with state and federal requirements.

Comment. We take issue that the list creation occurs without formal rule making process. (3) The APA the term "rule" to include every "regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency." 5 MRSA § 8002(9). Thus, if a statement: (a) applies generally to persons outside the agency; (b) is intended to have the same legal force as a statute, so that compliance could be compelled; and (c) implements the law administered by the agency or describes its procedures, then it is a rule and it must be adopted through appropriate APA procedures. (10)

It is requested that the Department take immediate steps to initiate a rulemaking proceeding to designate which water bodies are impaired. Until that rulemaking is completed the Department should be precluded from prohibiting any construction activity on the basis that it may cause or contribute to impairment of a water body deemed to be impaired. (10)

Response. The MCGP relies upon a list that is a subset of Maine's 303(d) list. The Department does not agree that the 303(d) list is a rule. See Response to comment above.

Comment (impaired waterbody (C)). The fact that the Department can designate a waterbody as impaired at any time without prior notice and opportunity for public comment by the public raises significant due process and possibly even takings concerns. (10)

Response. There are specific procedures under federal law for compiling a 303(d) list of impaired waters that the Department and EPA are required to follow. The public is given two opportunities to comment on the impaired waters list. The Department is required to make a draft list available for public comment. A summary of the significant public comments received, as well as the response to all significant comments, indicating how the comments were considered in the final decision, must be provided to EPA. See 40 CFR 130.36 If the EPA decides to propose a different list from that provided by the Department, then EPA must also put it the list out for public comment as provided in 40 CFR 130.34.

The list of impaired waterbodies (C) has been incorporated into the MCGP. This list can be changed as provided in existing statutory and regulatory processes for changing or updating requirements and conditions in a permit. Procedures to modify include required public notice to the licensee and all other interested parties of record, with an opportunity for hearing. Actions may be appealed. See 38 MRSA 414-A(5) Procedures on reissuance are substantially similar.

The following text has also been included:

<u>This general permit may be reopened to include or delete specific waterbodies or segment based upon new information. Reopening the general permit for this purpose is subject to the requirements in 38 MRSA 414-A(5), including notice to interested parties of record and opportunity for hearing. Actions may be appealed as provided in 38 MRSA 341-D and 346.</u>

PART III -- Requirements

Comment. The draft CGP contains a very broad provision that seeks to identify who is obligated to obtain coverage under the MCGP. It is unnecessarily broad. It should be revised to be consistent with the federal construction general permit, such that either the owner or operator must comply with the permit. (10)

This language is confusing and should be deleted. If the language is intended to extend a common plan to adjacent or to other property of the land owner/developer, which is not part of the subdivision or common plan, it is over reaching and exceeds the Department's authority. It is unclear what the Department is concerned about in the last sentence. It should be deleted. (14)

Response. The Department is relying on existing Maine definitions for "person" in the CGP, rather than "owner or operator". The general prohibition language, contained in the second paragraph of this Part, is based on existing and long-standing language in the Site Law and Stormwater Management Law (in statute), and is familiar to the regulated community dealing with stormwater and development projects under Maine laws. The concept of "operator" is fairly complicated and confusing, particularly when one tries to apply it to construction activity. The "operator" concept makes more sense when one is operating a wastewater discharge system. The Department has chosen to rely upon a definition and approach for stormwater, in the MCGP, that has worked well in Maine for over 30 years.

It should also be noted that use of the federal "operator" concept, as used under the federal Phase I CGP, also could increase the number of filings required. The Department does not believe that this additional paperwork would result in appreciable additional environmental protection.

Comment. If a subdivision does not require a DEP Stormwater Management Permit, it would appear that under the correct set of circumstances, a MCGP would be required, i.e., a large lot, long driveway, large house and lawn, if these improvements disturbed greater than one acre. Is this correct? (2)

Response. That is correct. There are three separate thresholds that may cause a project or part of a project to require coverage under the MCGP: (1) the project will create one or more acres of disturbed area; (2) the plan is a common plan of development; (3) the department designates the specific project based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the State. See the definition of "construction activity" at Part II(A). These are separate, independent thresholds.

(1) The subdivision developer would need to file an NOI if he or she creates one or more acres of disturbed area in total, such as through the construction of a road or other facilities, work on lots, etc.. This total excludes work done by lot buyers. The requirement to file an NOI for one acre or more of disturbed area applies without regard to whether a Site Law or Stormwater Permit is also required.

(2) A subdivision developer would be required to file an NOI if he or she proposes a subdivision that is (a) located in LURC jurisdiction, or (b) is not located in LURC jurisdiction but needs a Site or Stormwater Law permit.

A note has been added to the permit to clarify that a single NOI may be filed for a project that is both a common plan of development or sale, and includes one or more acres of disturbed area.

A lot buyer in the subdivision is required to file an NOI if he or she will disturb one acre or more of disturbed area on his or her lot. The requirement to file an NOI for one acre or more of disturbed area applies without regard to whether a Site Law or Stormwater Permit is also required, or where the project is located, or whether the developer filed an NOI for a common plan of development including the lot.

Comment. Is it the impact per lot or is it cumulative for each project. I assume it is per lot if the lots are not developed by the developer but rather by "joe public" [the lot buyer]. (2)

Answer. For purposes of determining total disturbed area for the 1 acre disturbed area threshold, the subdivision developer is responsible for the disturbed area he or she creates: areas disturbed by a lot buyer after an undeveloped lot is sold are not counted toward the developer's total disturbed area. If the developer did work on the lots, such as creating driveways or pads, that would be added to the developer's total disturbed area. The lot buyer is responsible for the work he or she does on his or her parcel, which includes unsold lots.

For purposes of the common plan threshold, the "subdivision" definition (3 lots) was used, because it is expected that the cumulative impact of 3 lots will include at least one acre of disturbed area (and more if any associated facilities are included).

Comment. We believe that to adequately protect the State's water resources, ESC plans should be required for all construction activities disturbing one acre or more. As the Department explains in the fact sheet, "[b]ased on Maine's soils, topography, and extensive water resources, the Department has determined that the great majority of construction activities disturbing one acre or more will result in discernable concentrated flows (direct discharges) to waters of the state." Because the majority of activities disturbing one acre or more will result in direct discharges, the permit should require ESC plans for all sites, not just for sites disturbing 3 acres or more. (9)

The Department should review all the ESC plans. (9)

Response. The Department's approach is based upon the premise that the performance standards in the appendices substitute for the planning requirement for the smallest projects, in watersheds draining to waterbodies that are not impaired. The federal EPA supports (Region 1) this approach as appropriate for small projects in Maine at this time. Although the Department recommends that all projects prepare ESC plans, it is not requiring them for all projects in this MCGP. Some of these small projects have not been regulated before in Maine. It is felt that there is more environmental protection to be gained by working to help these projects meet performance standards, and make the standards a normal part of doing business, than by requiring a plan for each site.

The Department does not have the resources to review all the ESC plans for small projects in Maine. More importantly, we believe that the persons listed in the MCGP as authorized to certify ESC plans can do an adequate job in most cases. In the higher risk situations, where projects are draining to impaired waterbodies, the Department will review the plans.

The Maine Nonpoint Source Training and Resource Center will continue to provide training for contractors on ESC plans.

Comment. Part II(A)(1) should apply if the project requires a Site law permit or an NRPA approval unless the NRPA approval is processed as a permit by rule. (14)

Response. The Department has not included the NRPA as a reference in this section because the NRPA has narrower coverage than the Site Law. Typically, the Site Law standards and submission requirements apply to the entire project; NRPA requirements only apply to the project to the extent it is located immediately adjacent to a resource.

Comment. Section 2, Other Projects appears to have missed specifying the requirements for some projects. Paragraph [c](i) applies to all jurisdictional projects located in the watershed of an impaired waterbody. It also should contain a note that it only applies if the development will impact the impaired area. For example, if the project is in the watershed but drains to the waterbody below the impaired area this section would not apply.

Paragraph [c](ii) applies to projects that disturb three acres or more than discharge to attainment waterbodies. What are the requirements that disturb more than one but less than three acres and discharge to an attainment waterbody? It is suggested that projects of this size should meet the requirements of paragraph 1 (Site Law). (14)

Response. An impaired waterbody may be a segment of a stream. Where only a segment is impaired, projects must meet the "impaired waterbody" standards if they drain to the impaired waterbody segment, to a waterbody flowing to the impaired waterbody segment, or to the waterbody above the impaired waterbody segment. These are the projects that "directly discharge" to the impaired segment. The comment is correct that the "impaired waterbody" standards would not apply to a project draining to the waterbody below the impaired segment. The Department does not feel that this requires further clarification in the general permit. However, the Department will keep the comment in mind, and if there are implementation problems with this text, will consider revising it in the future.

A project that disturbs one or more but less than three acres, and discharges to a non-impaired waterbody needs to meet the standards in Part III(A)(2)(a)(NOI and NOT) and (b)(Standards in Appendices A-C). Subparagraph (c) only addresses erosion control plan requirements. As a practical matter, these are the same standards as in (A)(1) ("paragraph 1" as mentioned in the comment). However re-writing the text to reference back to this provision ("paragraph 1") would be confusing, because not all projects that disturb three acres require Site Location permits.

Comment. In Part III(B), it should be clear that a common plan of development (subdivision) includes, at a minimum, all the infrastructure associated with a subdivision. There is no rational basis to treat a subdivision differently from any other project that requires a Site Law, LURC, or stormwater approval. These projects should meet the standards set out in Part III(A)(1). This is especially true since the Department is requiring redundancy by requiring the purchasers of lots to fill an NOI. It will also avoid the need for an applicant who proposes a subdivision and constructs a building or other impervious facility in the subdivision from filing two separate NOIs which would increase the paperwork burden on applicants and the Department with no benefit to the environment. (14)

Response. There are two ways that a developer of a subdivision may trigger the need to file an NOI. The "disturbed area" threshold and "common plan" (subdivision) thresholds are separate and distinct, as under federal law. This results in some unique requirements for subdivisions. Under the MCGP --

1. An NOI is required if subdivision developer himself creates 1 acre or more of disturbed area. In that case, the requirements of Part III (A) must be met.

2. An NOI is required if the subdivision developer himself creates enough disturbed and/or impervious area to trigger the need for a Stormwater Management permit or Site Law permit.

Note that most subdivisions will trigger the NOI requirement under both (1) and (2). The MCGP has been clarified to indicate that when this happens, only one NOI needs to be filed by the developer.

If a project comes under both (A) and (B) below, only one NOI is required.

The MCGP has also been clarified to indicate that review of the subdivision, for purposes of the MCGP, includes both lots and infrastructure.

> The standards apply to the lots in the subdivision as well as associated facilities such as roads, pads, and ponds.

It should be noted that a lot buyer in a subdivision who will disturb one acre or more is required to file an NOI. This is not "redundancy", and is consistent with the federal system. The subdivision developer is typically not required to follow through and ensure permanent stabilization on undeveloped lots sold under the MCGP (although her may choose to do so). When the lot buyer who will disturb an acre or more files an NOI, her or she is required to follow the requirements of the MCGP (with a slight reduction in requirements for residential buyers), through to permanent stabilization.

Comment. In Part III(B), the final paragraph ("A lot buyer…") should be moved to the beginning of the section since it appears to apply to both subdivisions regulated under subsections 1 (Site Law, Stormwater or LURC) and 2 (Other). The language in this paragraph should mirror the language in Section IV(E) as that language is easier to understand. (14)

Response. As written, the final paragraph applies to all of (B). It is a relatively minor point, and is therefore appropriately located at the end.

The two provisions that the comment suggests should better mirror one another are:

1. A lot buyer or subsequent transferee within a common plan of development or sale must submit an individual NOI if he or she proposes a construction activity as defined in Part II(A), regardless of whether the developer has filed an NOI.

2. "…a buyer or lessee of a lot in a subdivision reviewed as a common plan of development is not required to file an NOI unless his or her construction activity will include one acre or more of disturbed area."

The Department agrees that it would be better if these texts were more consistent. However, in reviewing these provisions in response to this comment, it is noted that #1 is a more complete statement. Both provisions have been amended as follows:

> 1. A lot buyer or subsequent transferee within a common plan of development or sale must submit an individual NOI if he or she proposes a construction activity (as defined in Part II(A)), regardless of whether the developer has filed an NOI for the common plan of development or sale.

2. …a lot buyer or subsequent transferee within a common plan of development or sale is not required to file an NOI unless he or she proposes a construction activity as defined in Part II(A). ~~a buyer or lessee of a lot in a subdivision reviewed as a common plan of development is not required to file an NOI unless his or her construction activity will include one acre or more of disturbed area.~~

Comment. Part III(C). This provision requires that if the waterbody to which a direct discharge drains is impaired and has an EPA approved TMDL, then the discharge must be consistent with the TMDL. This provision was added to the CGP recently, and the Department needs to clarify what this provision means and how the regulated community should comply with it. (10)

This language must be limited to require consistency with those TMDLs that have waste load allocations because only the waste load allocation portion of a TMDL addresses point source discharges. (10) (12) (14)

If the TMDL does not have a waste load allocation for point sources, then consistency with the TMDL would be assumed, and no additional requirements would apply. If the TMDL has a waste load allocation but the waste load allocation does not contain specific requirements additional to the CGP for point source discharges for future construction activities, then compliance with the consistency requirements should be assumed as long as the activity is in compliance with the CGP. (10)

While we understand that most TMDLs include a "margin of safety" intended to allow for future development in a watershed, we are not aware of any approved TMDL that contains a requirement on future construction activity that are additional to what would otherwise be required in the CGP. Therefore, we request that the Department confirm that construction activities that are in compliance with the CGP will be deemed to be consistent with approved TMDLs in the absence of specific additional requirements in an approved TMDL that apply to future construction activities. (10)

Response.
The Department has made the following changes.

V. Total maximum daily load (TMDL). If the waterbody to which a direct discharge drains is impaired and has an EPA approved TMDL, then the discharge must be consistent with any waste load allocation (WLA) contained in the TMDL and any implementation plan.

Note: based upon TMDLs approved by the federal Environmental Protection Agency prior March 10, 2003, this subsection concerning TMDLs does not require a construction activity to meet additional requirements to those otherwise specified in this general permit. If additional requirements result from a TMDL or implementation plan on or after March 10, 2003, they will not apply to a construction activity eligible for coverage under this general permit until incorporated into this general permit. Such requirements would be incorporated upon reissuance of the general permit, or reopening of this subsection of the general permit. A general permit may be reopened as provided in 38 M.R.S.A. § 414-A.

Part of the concern of the comments is to seek clarification on how the regulated community is to comply with the provision. The Department agrees that the language in the draft MCGP was insufficient in this regard, in that it was unclear what if any additional requirements would apply

to a particular construction activity in a watershed with a TMDL. Therefore, the note above has been added to address this point.

In related text, Part IV(A)(2)(i) was amended as follows:

> i. Name of the receiving water(s) or if the discharge is through a municipal separate storm sewer system, the name of the municipal operator of the storm sewer. ~~Indicate whether the discharge is to a waterbody with an approved TMDL.~~

This information is no longer routinely necessary, given the other changes.

In related text, Part V(D) was amended as follows:

> **D. Total maximum daily load (TMDL).** This general permit does not authorize a direct discharge that is inconsistent with any EPA approved TMDL for the waterbody to which the direct discharge drains as provided in Part III(C).

It is not correct that most TMDLs include a "margin of safety" intended to allow for future development. The "margin of safety" in a TMDL is intended to address error in the model.

PART IV -- Procedure

Comment. Part IV (A). The draft permit provides that the applicant shall provide a copy of the initial NOI form to the municipal office. The DEP should take responsibility for copying the NOI to the municipality, rather than having the applicant do it. (15)

Response. Agreed. The requirement that the applicant forward a copy of the NOI form has been deleted from the general permit. The Department will forward a copy of the NOI to the municipal office (or LURC). This is consistent with the procedure used under the Natural Resources Protection Act (NRPA) Permit by Rule (PBR) program, where the Department forwards a copy of the notification form.

> **A. Notice of Intent (NOI).** When the applicant submits an NOI, he or she agrees to comply with the standards and requirements of this general permit. ~~The applicant shall provide a copy of the initial NOI form to the municipal office of the town or city in which the discharge will occur at the time it is submitted to the Department.~~ An NOI must be submitted to the Department with the appropriate fee.

Comment. If a particular stand alone project and not within a common plan of development, disturbs less than 3 acres and is not within the watershed of an impaired waterbody, then no NOI is required but the standards of the Maine Erosion and Sedimentation Control Law apply? (4)

Response. No.
(1) The only time that the only applicable standards are those of the Maine Erosion and Sedimentation Control Law is when a common plan of development (subdivision) does not require an NOI and is located outside LURC jurisdiction. The subdivision does not require an NOI if it is located outside LURC jurisdiction and is small enough to avoid review under either the Site Law or Stormwater Management Law. The subdivision meeting these requirements may be draining to an impaired waterbody -- that doesn't change the result. But, see (2) below.

(2) An NOI is still required for a disturbed area of one acre or more, for all types of projects, across the board. Therefore, even if (1) above applies, the developer of a common plan of development (subdivision) must still submit an NOI if he himself disturbs one or more acres of disturbed area. If this disturbed area is proposed, a NOI is required without regard to whether a Site Law or Stormwater Management Law permit is required.

If the disturbed or impervious area is large enough to trigger the Stormwater Management Law, then the standards must be addressed for all the lots in the subdivision. See Part III(B)(1)(b).

In the rare case where a subdivision developer himself or herself disturbs one acre outside LURC jurisdiction, but the project does not need a Stormwater Management Law or Site Law permit, then the NOI would only be filed for the project the developer is undertaking himself or herself. The NOI would not be for the common plan of development or sale.

Comment. How is the loop closed if the developer initiates the NOI, informs the buyer about the requirements -- how is he in any position to obtain photographs for the NOT or be in any position of responsibility?

Response. The MCGP has been revised to add an exception.

> Photographs showing the completed project and the affected area. Exception: a person filing an NOT for a common plan of development is not required to include photographs for disturbed areas created by lot buyers or lessees.

Comment. Part IV (A). Are the "triggers" based on start-up of construction or approval date of a site or subdivision plan, especially within an MS4? (15)

Response. This response only addresses the MCGP. The draft permit provides that an NOI must be reviewed and approved by the Department prior to beginning construction activity or causing soil disturbance. See Part IV(A)(1) of the draft general permit. The threshold is not specifically related to the date of site or subdivision plan approval. However, the date of a subdivision approval may be important during the transition period (beginning of the new permit), for determining if a common plan of development or sale requires an NOI. See Part IV(H) as revised. Also, the subdivision developer should ensure that the NOI is obtained prior to any soil disturbance by himself (or herself) or a lot buyer.

Comment. Part IV(A)(2). Subsection F of this section provides that a drawing of the proposed activity (site plan) must be provided showing specified area and resources. It should be understood that an engineering plan is not required, consistent with the approach under the NRPA's permit by rule program. (10) (14) We request that the language be modified to state that a drawing of the proposed activity "showing, in general terms" the specified areas and natural resources would be more appropriate. The regulated community should understand that an engineering plan is not required. (10)

Response. The MCGP process was modeled after the Natural Resources Protection Act's permit by rule process. Chapter 305 (permit by rule) requires a scaled plan or drawing, and includes a provision concerning whether the plan has to be professionally drawn. The provision the MCGP has been modified as follows, to be consistent with the permit by rule approach.

> A scaled plan or drawing of the proposed activity (site plan). Identify retained downgradient buffers, or explain in a narrative why such buffers will not be retained (see Pollution

> Prevention standard, Appendix A(1)). Identify protected natural resources, such as wetlands, streams, or high water line of ponds or coastal wetlands on the site plan. It is not necessary to have the plan professionally prepared. However, it must be legible and drawn to a scale that allows clear representation of distances and measurements on the plan.

Note that when a project requires a Site Law, Stormwater Management Law, or LURC permit, more stringent requirements may apply.

Comment. Part IV(A)(2)(j). Subparagraph j would be deleted as it exceeds the federal law requirements.

Response. The "federal law requirements" the comment intended to refer to where not specified, therefore a specific response is not possible. This provision (Part IV(A)(2)(j)) is based upon a state law requirement in Maine that a state agency may not license a project that will significantly alter habitat of any species designated as threatened or endangered, or violated protection guidelines, without a determination from IF&W. See 12 MRSA § 7755-A. The approach used in the MCGP is based on that used in the NRPA permit by rule program. There is no federal or state law that allows the Department to avoid complying with Maine statutory law on this issue.

It should be noted that projects that were regulated under the federal stormwater program administered by EPA had to meet endangered and species requirements through that general permit, which were based upon federal law provisions. The Department could also have incorporated these provisions in the MCGP, but did not choose to do so at this time.

Part IV(C). Mail/copy.

Comment. Part IV(C) should specify how long the applicant must keep these forms. One year or less is suggested. (14)

Response. Federal rule 40 CFR § 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25) specifies that "the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time." The Department has concluded that if all data used to complete an NOI or NOT must be kept at least 3 years, that the notice forms should also be kept at least 3 years. Part IV (D) has been revised accordingly.

> **Documents.** The permittee shall retain copies of the ESC plan and any forms, submissions, reports, or other materials required by this general permit for a period of at least three years from the completion of permanent stabilization. This period may be extended by request of the Department.

Comment. The period of document retention should be set at three years. There is no justifiable basis for the Department to require an applicant to retain these records for more than three years. The last sentence should be deleted. (14)

Response. Federal rule (40 CFR § 122.41, applicable to State programs; see above response) specifies that the period "may be extended by request of the Director at any time." The language in the MCGP is consistent with the Federal rule and has not been changed.

Comment. Under Part IV(C), applicants should be allowed to send forms by FedEx, UPS, Airborne or other service that utilizes a tracking system and identification or registration number. (14)

Response. It is acceptable if forms are sent by means other than certified mail, provided a record of DEP receipt is obtained. Part IV (C) has been revised to reflect this.

> **C. Mail/copy.** The notification forms must be sent to the DEP by certified mail (return receipt requested) or other service providing a record of DEP's receipt of the item to the sender, or hand delivered to the DEP and date stamped by the Department. The applicant must keep a copy of the notification forms and all materials provided to the Department.

Comment. The requirement in Part IV(E) that an applicant submit an updated NOI for "minor changes" seems unnecessarily burdensome for both the Department and the regulated community. If there are minor changes that have the potential to adversely impact the environment, it would be appropriate to notify the Department. The Department should specify what minor changes require modification, if any, and so limit this section. (14)

Response. The draft MCGP did not require that the applicant submit an NOI for all minor changes. The section provides that the permittee may notify the Department of changes through the submission of updated information in writing. An NOI is only required as the means to notify the Department of a change when the person proposes to expand or relocate disturbed area of one acre or more beyond what was indicated in the original NOI, or to change the waterbody to which the stormwater will be discharged. The first two paragraphs of provision has been amended to clarify this requirement further.

> **Changes in the activity or owner/lessee.** Coverage under this general permit will be continued provided there are no changes in the discharge as described in the NOI and associated submissions. If ~~minor~~ any changes are proposed in the activity, the person having filed the NOI must notify the Department through the submission of updated information in writing, including submitting or obtaining certification for any revisions to an ESC plan required in Part III.
>
> The updated information must be submitted with a new NOI if the permittee ~~A person who~~ proposes to expand or relocate disturbed area of one acre or more beyond what was indicated in the original NOI, or to change the waterbody to which the stormwater will be discharged~~, must submit a new NOI~~. Information concerning other changes may be submitted in a letter.

Comment. Is coverage under the MCGP needed for a project that was started prior the effective date of the MCGP, but that is not completed until after the effective date? (2)

Response. Transition provisions are provided under the MCGP in Part IV(H). They have been substantially clarified.
(1) Phase I project (based on disturbed area). An ongoing activity must submit a notice of intent as required in this general permit unless (a) it completes permanent stabilization of all disturbed area prior to March 10, 2003; or (b) it is eligible to submit a Notice of Termination (NOT) by June 9, 2003.
(2) Phase II project (based on disturbed area). An ongoing activity must submit a notice of intent as required in this general permit if at least one acre of disturbed area is created on or after March 10, 2003.

It also became clear in reviewing this provision that transition language concerning projects triggering the "common plan of development or sale" threshold needed to be included. The deadline by which both Phase I and Phase II projects must file their NOIs has also been made the same.

H. Initial issuance of this general permit

1. Construction activity including one acre or more of disturbed area. This subsection applies for purposes of determining jurisdiction under the "one acre" threshold only.

a. ~~1.~~ Prior authorization under Phase I. A person with on-going construction activity as of March 10, 2003 ~~the effective date of this general permit~~ who received authorization to discharge for the project under the prior federal Phase I Construction General Permit shall submit a notice of intent (NOI) prior to or on June 9, 2003. ~~within 90 days of the effective date of this permit. If the permittee is eligible to submit a Notice of Termination (NOT) before the 90th day, the permittee is not required to submit an NOI to the Department.~~ Until filing of the NOI or NOT, the person shall comply with the all requirements of the prior federal construction general permit.

An ongoing activity must submit an NOI as required in this general permit unless (i) it completes permanent stabilization prior to March 10, 2003; or (ii) it is eligible to submit a Notice of Termination (NOT) prior to or on June 9, 2003. If an NOI is required, the requirements of Part III must be met for areas that have not been permanently stabilized as the date the NOI is approved by the Department.

b. ~~2.~~ Lack of prior authorization under Phase I. A person with on-going construction activity as March 10, 2003 ~~of the effective date of this general permit~~, who was required but did not obtain authorization required under the prior federal Phase I Construction General, ~~shall~~ is required to submit an NOI as provided in this general permit ~~as of the effective date of this permit~~ as of March 10, 2003.

c. ~~3.~~ Phase II construction activity. A person with an on-going construction activity as of ~~the effective date of this general permit~~ March 10, 2003 who was not required to obtain authorization under the federal Phase I Construction General permit, but is required to obtain authorization under this general permit, shall submit an NOI by June 9, 2003 ~~**April 17, 2003.**~~ This requirement applies without regard to whether the project will be completed prior to June 9, 2003.

An ongoing activity must submit an NOI as required in this general permit if one or more acres is cleared, graded or excavated so as to meet the definition of "disturbed area" (in Part II) on or after March 10, 2003.

2. Common plan of development or sale. This subsection applies for purposes of determining jurisdiction under the "common plan of development or sale" threshold only.

A common plan of development or sale (subdivision) is not required to meet the requirements of this general permit if it received approval from LURC or the municipality where it is located before March 10, 2003.

a. If a subdivision that received municipal or LURC approval prior to March 10, 2003 is modified on or after March 10, 2003 so as to add three or more subdivision lots as determined by LURC or the municipality, this general permit applies to those lots and their associated facilities as provided in Part III.

b. If a subdivision receives approval on or after March 10, 2003, then this general permit does not apply to lots transferred before March 10, 2003.

Note: The person subdividing the land must still file an NOI if he or she will undertake construction activity on the parcel that includes one or more acres of disturbed area, as provided in Part IV(H)(1) above, on or after March 10, 2003. Examples of such activity would be road or pad construction, or stripping and grading. A single NOI may be filed for both the common plan of development or sale and this disturbed area.

Note: A lot buyer or lessee who will undertake construction activity including one or more acre of disturbed area on or after March 10, 2003 must file an NOI, under Part IV(H)(1) above, without regard to whether municipal or LURC approval has been obtained for the subdivision containing the lot or when such approval occurred.

Comment. Is coverage under the CGP needed for a project that was started prior to the effective date of the CGP, and has all the earthwork done but no vegetation growing on the effective date? (2)

Response. For, Phase I, yes. For Phase II, no. The different result is because the Phase I requirements are continuing coverage that was previously required. If a project was started before, it needs to continue to meet general permit requirements through to the completion of the project (permanent stabilization). For Phase II projects, which is a new program, the Department is not asserting jurisdiction over a previously disturbed area, unless it is reworked (ex. there is a new project, such as tearing up a parking lot to construct).

Comment. If the above (see last two comments) require permit coverage, who is responsible for seeking out and informing the responsible party that one is needed?

The above projects (see last two comments) in all likelihood have a stormwater permit (since over 1 acre)? (2)

Response. Persons conducting activities regulated under this program are responsible for complying with applicable requirements under federal and state law.
(1) Phase I. A person who has filed an NOI under the existing federal construction general permit is subject to its permits conditions. These permit conditions provide notice that the permit period is limited, and a person must re-file to maintain coverage under a subsequent permit.
(2) Phase II. The Department expects to do the best it can, with available resources, to reach the regulated community. This effort includes training, web materials, use of newsletters, supplementary materials, etc. A learning curve is expected, and the Department has included a grace period for filing.

It is likely that some of the projects will have a Stormwater Management Law permit. However, a project in LURC jurisdiction will not. A project that created 20,000 sq. ft. of impervious area in a most at risk watershed may not. A project that disturbed under 5 acres and had less than 1 acre of impervious area, outside a most at risk watershed, will not.

Comment. Under Part IV(H)(1) (Prior Authorization under Phase I), ongoing construction activities must submit a NOI within 90 days of issuance of the final permit, however it is unclear whether the requirements of Part III(A)(Construction activity, other than common plan of development or sale) apply to this submittal. Thoughts? (5)

Response. The continuing Phase I project needs to continue to meet the requirements under the federal CGP until an NOI is approved by the Department. At that point, the state MCGP requirements apply. The text has been clarified on this point.

Comment. Aren't projects likely to already have a Maine Stormwater Management permit (since over 1 acre)? Could DEP issue an amendment to the Stormwater or Site Location permit to cover this? DEP is in a better position to locate the affected party since presumably he/she already has a permit.

Response. The Maine Stormwater Management Law's one acre (and 20,000 sq. ft.) threshold are for impervious rather than disturbed area. The disturbed area threshold under the Stormwater Management Law is 5 acres. A person creating one acre of impervious area would be expected to disturb at least one acre, as disturbed area is defined under the MCGP. However, a person outside a most at risk watershed may have created 1-5 acres of disturbed area without triggering either the Stormwater Management Law or the Site Law.

Comment. Part IV(H)(1) and (3). A person with an on-going construction activity with authorization under Phase I, or required to obtain authorization under Phase II must submit an NOI (unless timing of the activity requires only an NOT). It is our understanding that if an ESC plan was submitted and reviewed previously under Phase I, Site Law or Stormwater Management rules, an ESC plan does not have to be attached with the NOI for review. This point needs to be stated. (3)

Response. The statement is partially correct, and the MCGP has been clarified on this issue. If an ESC plan was previously submitted and approved under the Site Law or Stormwater Management rules, it may be referenced and relied upon when submitting the NOI to the extent the previously submitted plan meets the requirements and standards of the NOI. To the extent it does not meet or address those standards, supplementary material must be submitted.

In order to clarify what needs to be addressed by the applicant, the Department has clarified the MCGP to indicate that the ESC plan submitted with an NOI must address the standards in Appendix A. The following changes have been made.

1. **Development requiring review pursuant to the Site Law**. If the development requires Site Law permit, the following applies.
   a. Submit NOI and NOT.
   b. Meet the standards in Appendices A-C of this general permit.
   c. Erosion and sedimentation control (ESC) plan development and maintenance. An ESC plan is a plan that demonstrates how the standards in Appendix A will be met. An ESC plan is required pursuant to the Site Law, and additional requirements may apply pursuant to the Site Law. It is not necessary to submit a separate ESC plan with the NOI. See Part III (D) concerning referencing a plan submitted as part of a Site Law application.

~~Note: An erosion and sedimentation control plan is required as part of the Site Law application~~.

2. **Other projects**. For other construction activities, the following applies**.**
   a. Submit NOI and NOT.
   b. Meet the standards specified in Appendices A-C of this general permit.
   c. Erosion and sedimentation control (ESC) plan development and maintenance. An ESC plan is a plan that demonstrates how the standards in Appendix A will be met. See Part III(D) concerning referencing a plan submitted as part of a Stormwater Management application.

The following new section has been added at Part III(D).

D. ESC plan. Material submitted with an application for a Site Law or Stormwater Management Law permit may be referenced to the extent it substantively addresses the standards in Appendices A. If not all the standards are addressed, supplementary material must be provided with the NOI. If an applicant wishes the Department to rely in whole or part a submission that is part of a Site Law or Stormwater Management Law application, the applicant should submit a letter with the NOI describing the previous submission and the extent to which it should be relied upon, and listing the standards addressed by any supplementary material.

It is not possible that an ESC plan would have been previously submitted and reviewed by the Department under Phase I, since the Department has not previously implemented Phase I.

Comment. The MCGP should be clarified to indicate whether permit coverage needs to be obtained in the following situations.

(1) Construction activity that was required to but did not obtain authorization under the prior EPA Phase I construction permit -- what date is an NOI required to be submitted to DEP?

(2) Ongoing Phase II construction activity (that is construction activity of less than five acres) as of February 17.

   (a) If the project will be completed before April 17, 2003, is submission of an NOI required?
   (b) If the project will not be completed by April 17, 2003, is an NOI required if most of the construction was completed by March 10, 2003, and less than an acre was disturbed after March 10, 2003 even if in total the project (including activities before March 10 and after March 10) exceeds one acre? Note that in this situation, because of the effective date of the Phase II regulations, the construction activities that occurred before March 10, 2003 were not required to obtain a permit, and an argument can be made that only ground disturbing activities that occurred after that date should be counted towards determining whether coverage under the permit is required. (10)

Response.
(1) A person who was required be did not obtain authorization under the Phase I federal must file an NOI under the MCGP in order to avoid a continuing gap in coverage. Note that if such a person obtains authorization from EPA, even shortly before the expiration of the federal CGP, he or she has until June 9th, 2003 to file. The MCGP has been clarified on this point.
(2)(a) Yes.
(2)(b) The comment is based upon the incorrect assumption that the federal phase II regulations will take effect March 10, 2003. These regulations took effect February 7, 2000. See 64 FR 68772 (December 8, 1999). Maine chose to engage in a stakeholder process and did not meet the

deadline, although it was still the first of the northeast Regional 1 states to submit its draft CGP to EPA for review. The federal program requires that NOIs be submitted to delegated state permitting authorities by March 10, 2003 or an earlier date set by the permitting authority. March 10 is a deadline, not an effective date. The Department is issuing a single, combined MCGP to cover both Phase I and Phase II. Requirements for both phases will take effect on the same date, when the permit is issued. The Department is also giving a grace period for filing a Phase II NOI June 9th, 2003 (see Clarifications and Changes section at end of this document), in order to all more time for the regulated community to become familiar with the program.

PART V -- Limitations on Coverage

Comment. Part V(A)(Notice of Intent). This section authorizes the Department to require anyone with a discharge authorized by the general permit to obtain an individual permit, but contains no standards as to when or why the Department may require the individual permit. We request that the language be revised to specify the basis on which an individual permit would be required. (10) (14) Criteria are necessary to avoid arbitrary decisions. The criteria referenced in Chapter 529 are not applicable to the CGP. (14)

Response. The potential requirement of an individual permit is drawn from existing rules at Chapter 529(2)(b)(3). The rule, which is referenced in the general permit, contains examples of when an individual permit may be required. Because individual projects and site conditions vary, and the Department is just beginning administration of this new program, it would be inappropriate at this time for the Department to limit its existing authority under statute and rule.

The criteria referenced in Chapter 529 apply to all general permits, including the MCGP. Chapter 529(2)(B)(3) begins:

> "The Department may require any discharger authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the Department to take action under this paragraph. Cases where an individual NPDES permit may be required include the following…".

Some of the examples given in the chapter would not be applicable stormwater discharge, and some would. The citation to the examples in the MCGP was incorrect and has been corrected. Chapter 529 is available on-line at: http://www.state.me.us/sos/cec/rcn/apa/06/chaps06.htm

Note that the language in Chapter 529 is consistent with federal rules. See 40 CFR 122.28(a)(3), available on-line at: http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr122_00.html This language was adopted in rule by the Department in order to be consistent with minimum federal requirements.

Comment. Part V(F)(Violation of water quality standards). This language should be revised to state that the general permit does not authorize a discharge that "will" (not "may") cause or contribute to a violation of a water quality standard. (10)

Response. The Department does not agree that this language should be changed.

Comment. Part V, page 9, footnote 10 -- should the reference be two 06-096 CMR 529 rather than 592? (3)

Response. Yes; it should have been 06-096 CMR 529(2)(b)(3). The MCGP has been corrected.

PART VI -- Relationship to other programs

Comment. Part VI(B)(Quarries and Borrow Pits). The draft CGP provides that quarries and borrow pits that comply with the requirements of the specified laws do not need to obtain coverage under the general permit except that an erosion and sedimentation control plan must be submitted or certified as provided in Part III(A)(2). We believe this provision is unnecessary, inappropriate, and will lead to confusion in the regulated community. If the Department believes that an ESC plan should be added to the requirements of the borrow pit and quarry laws, then it should seek an amendment to these specific laws. Also, the language is extremely unclear. We assume that the Department intended that an erosion and sedimentation control plan would only have to be submitted for those projects that otherwise meet Part III.A(2). In other words, only if the borrow pit or quarry includes one acre or more of disturbed area discharging to an impaired water body or three acres or more of disturbed area discharging to any other water body would an ESC plan have to be submitted or certified. If the borrow pit or quarry does not discharge to a water body at all, then no ESC plan would be required.

We request that the requirement to submit an ESC plan be deleted. Alternatively, the language should be clarified as to when the ESC plan must be submitted or certified. (10)

Response. The text for this section has been replaced. Some parts of this text (ex. the list of what construction activity includes) were drawn from the Multisector General Permit, for purposes of consistency. The new text provides:

B. Quarry or an excavation for borrow, clay, topsoil, or silt. Clearing, grading or excavation activities conducted as part of the exploration and construction phase of a mineral mining operation must meet the requirements of this general permit, if they will result in the direct discharge of stormwater to waters of the state other than groundwater, will disturb one or more acres of land, and occur on or after March 10, 2003. These requirements do not apply to an area that is internally drained. Construction activity includes the building of site access roads and removal of overburden and waste rock to expose mineable materials. If the activity must meet the requirements of this general permit, the following exceptions apply.

1. **Stabilization deadlines.** The 14 day time limit for temporary stabilization in Appendix A(3), and the one-year time limit for permanent stabilization in Appendix A(5) do not apply.

2. **If under the Gravel Pit or Quarry Program -- may need to do an ESC plan.** If the clearing, grading, or excavation activity subject to this general permit is also required to meet the Performance Standards for Excavations for Borrow, Clay, Topsoil or Silt,[3] or Performance Standards for Quarries[4], then the operator does not have to meet the requirements specified in Part III of this general permit, except for the ESC plan requirements in Part III(A)(2).

In some cases, an area that is not internally drained initially may become internally drained during construction. For an area that has become internally drained, it is not necessary to undertake stabilization as otherwise required under this general permit before filing the NOT.

[3] 38 M.R.S.A. §§ 490-A et. seq.
[4] 38 M.R.S.A. §§ 490-W et. seq.

Comment. Under 38 MRSA Sections 490 must be naturally internally drained or obtain a variance under 38 MRSA Section 490-E or 490-CC to ensure there is no increase in post development runoff over predevelopment conditions. The requirements extends to all activities on the site including excavations, access and haul roads, stockpile and grubbed areas. Requiring gravel pits and quarries operating under these rules to also be regulated under the proposed General Permit for Construction Activity is duplicative and unnecessary and the rules should be amended to state clearly that:

B. Quarry or an excavation for borrow, clay, topsoil, or silt. Excavations in conformance with the standards and procedures under the Performance Standards for Excavation for Borrow, Clay, Topsoil, or Silt are exempt from the requirements of this general permit.

There is no increase in environmental protection of the waters of the State of Maine by including activities, which by definition must be naturally internally drained such that there is no run-off as a result of the development to either abutting properties or to a protected natural resource. Inclusion of these activities is duplicative and unnecessary. Adding unnecessary regulatory burdens will not enhance environmental protection. We urge you to revise this section and completely exempt gravel pits and quarries operating under Title 7 and Title 8-A. (18)

Response. The Department reviewed the standards contained in the existing gravel pit and quarry programs, and allowed the standards in those programs to apply in lieu of the standards in the MCGP where they were at least as stringent as those in the MCGP. This was not true in all cases. The Department does not have authority to "exempt" these projects from NPDES requirements. The exploration and construction phase of an excavation activity is regulated as "construction activity" under the federal program, and these activities are required to meet the same standards as other activities. As clarified in this section, the MCGP does not apply to any part of the project that is internally drained. It only applies to portions, such as an access road, that are not internally drained and discharge to surface waters. If someone constructed a one-acre access road to a gravel pit, and the road discharged to an impaired waterbody (C), the operator would need to submit an ESC plan for review (addressing the road), just as would someone constructing a one-acre access road to a commercial subdivision.

Comment. Part VI(C)(Other programs such as Site Law, Stormwater, and Waste). The last sentence of this section should be revised to state that the Department will waive the fee required with the NOI when more than one application is required. (10)

Response. The provision as written gives the Department authority to waive a permit fee for certain combined applications, but does not require it. The Department will be considering combining applications, and how or if this may best be done, in the future. Part of this work involves considering the impacts upon internal work flows and related costs. Waiting permit fees at this point, prior to this work, would be inappropriate.

PART VII -- Standard Conditions

Comment. Part VII(A). There is an apparent legal conflict in need of immediate resolution. One cannot get a general permit for construction activity in small watersheds of less than 10 square miles, lake watersheds, or high quality streams. What will be the course of action if emergency legislation does not occur? (3)

Footnote 11 notes that Maine law currently does not allow the discharge of storm water to Class A waters or to watersheds of less than 10 square miles, and that the Department is "considering"

proposed emergency legislation to allow such discharges under appropriate conditions. This language should be strengthened to demonstrate the Department will fix this problems. (10)

The Department should submit legislation to amend Class A criteria to allow for stormwater. Restrictions 3 and 4 should be rewritten so that the restriction only applies if the discharge will cause or contribute to a violation of the water quality classification. (14)

Response. The issue concerns watersheds of less than 10 square miles, and discharges to Class A waters. Stormwater discharges in lake watersheds (to lakes) are allowed as provided in 38 M.R.S.A. 465-A(1)(C)(first sentence).

Reference: http://janus.state.me.us/legis/statutes/38/title38sec465-A.html

The Department has proposed and is supporting emergency amendments to the two statutory prohibitions that would allow stormwater discharges under appropriate conditions. The proposed amendments from the Department have been approved through the Governor's Office (both the King and Baldacci administrations). A decision concerning the amendments is the province of the Legislature and Governor. The language in the general permit does not affect this decision. However, the text in the footnote has been changed as follows:

> "The Department is ~~considering~~ proposing emergency legislation to allow certain stormwater discharges to Class A waters and to watersheds of less than 10 square miles. The statutory provisions control for purposes of this general permit."

The Department may not authorize a discharge that is prohibited by statute. Therefore, the Department may not revise Restrictions 3 and 4 so that they conflict with statutory restrictions.

Discussion of legislation is beyond the scope of this general permit.

Comment. This permit contains some apparent contradictions in Part VI, which concerns prohibitions on discharges to GPA, AA, A and SA waters. Although DEP rules do not allow discharges to these GPA, AA, and SA waters and only allow discharges of water equivalent or cleaner than receiving water quality to A waters, this permit clearly shows DEP's intention to further legitimize stormwater discharges to the highest quality waters in the state. We urge DEP to justify this decision and to provide some estimation of what its impacts will be. Will it, for example, provide a precedent to allow other discharges in the state's highest quality waters? (11)

Response. The waste discharge rules in this area have not been updated to reflect changes in statute made since the rules were last updated. Where there is an inconsistency, the statutory provisions control. Stormwater discharges are allowed under certain conditions to GPA and SA waters at this time. See 38 MRSA §§ 465-A(1)(C), 38 MRSA 465-B(1)(C).

It is correct that the Department is supporting legislation to allow stormwater discharges to Class A waters if certain standards are met. This change will be considered before the Legislature, and is outside the scope of this permit issuance.

Comment. This comment is referencing text in the draft MS4 general permit, but similar text appears in the MCGP. In the MCGP, the text appears in Part VII(A)(3). Comment: Part I(D)(7) observes that a waste discharge license may be required pursuant to Chapter 543. It is redundant because the requirement to obtain a waste discharge license is already noted in Part I(D)(6). Therefore, this section should be deleted. At a minimum the definitions recited in the second

paragraph should be deleted because they are not supported by citations to any Maine regulation, and do not appear, at least as written, in Chapter 543. (12)

Response. The text reference provides guidance concerning when a license may be required for the discharge of stormwater to groundwater. The Department considers this information useful to applicants, and has retained the text.

Comment. This permit will do little or nothing to address post-construction impacts of new or existing development on rivers, streams and many other waterbodies, and in many cases, existing development is the most important source of water quality problems. We strongly urge DEP to address post-construction and existing development stormwater impacts quickly and effectively. (11)

Response. The Department agrees that post-construction impacts must be addressed in Maine, and will be working on this issue in the coming year.

Comment. Part VII (B) should be rewritten to require that pollutants removed or resulting from treatment of stormwater be disposed of in a manner consistent with State law, instead of requiring disposal "in a manner approved by the Department." (14)

Response. Part VII consists of Standard Conditions that are required by rule, including the requirement that removed pollutants be disposed of in a manner approved by the Department (see 06-096 CMR 529.3(h)). No change has been made.

Comment. Part VII (C) -- Monitoring is expensive for the property owner and time consuming for the Department to review. This section should identify what conditions will trigger the monitoring requirement. At a minimum, it is suggested that the monitoring requirement be limited to projects requiring an individual permit. (14)

Response. Part VII consists of Standard Conditions that are required by rule, including the following requirement (see 06-096 CMR 529(3)(g)):

> "(g) Monitoring requirements. In addition to monitoring required by the conditions of specific General Permit, the Department may require additional monitoring of an individual discharge as may be reasonably necessary in order to characterize the nature, volume or other attributes of that discharge or its sources."

No change has been made.

Appendices (performance standards)

Comment. The DEP should consider adopting buffer zone and impervious surfaces requirements where appropriate to further protect receiving waters. (9)

Response. The MCGP requires that natural downgradient buffer areas be retained to the extent practicable. However, the comment seems primarily concerned with post-construction stormwater flows. The Department agrees that post-construction flows are significant and important, and will be working to address them in the near future. However, the MCGP is only designed to address a small part of the stormwater issue -- flows from construction activities.

Comment. The requirement that all developers keep an inspection log is excessively burdensome, particularly to small projects. MEREDA recommends that this requirement only apply to projects in impaired watersheds or require a Site Law approval. (14)

Response. Maintenance is a necessary part of preventing the discharge of pollutants from a site. A permittee needs to be able to demonstrate that inspections and maintenance are occurring during the construction period. The Department does not find this requirement to be overly burdensome.

Comment. Under Appendix C, authorized non-stormwater discharges include "fire hydrant flushing if released to a vegetated buffer area." In the majority of situations it would be possible to comply with those provisions, particularly if the activity is a planned event that can be scheduled during wet weather and/or high flows, or if the activity is proximate to a vegetated buffer. However there will be many operations and maintenance situations that the proposed provisions would not accommodate.

Included in this category would be new water mains that are disinfected and flushed following their installation, ruptured water mains that have been repaired and that need to be disinfected and flushed before putting back into service and the opening of multiple hydrants (as part of flow testing procedures) that is periodically required by the Insurance Services Offices. Distribution system flushing, a maintenance procedure that is necessary to maintain water quality, can usually be accomplished under the scenarios detailed in the proposed permits, but that is not always the case. There are other situations that may require the release of water from the distribution system. Many of these activities can often, but not always, be accomplished during a wet weather event, high stream flows, or to a vegetated buffer.

It is extremely important that our water system operators retain the ability and flexibility to operate the public water systems in such a way as to maintain water quality and protect the public health. In most situations it will be possible to do that while incorporating the principles and procedures in the proposed permits. It may also be possible to chemically neutralize the residual disinfectant in the system water as it is being discharged to the environment; however certain neutralization procedures may be more acceptable than others. We would welcome the opportunity to work collaboratively with department staff in developing procedures that best meet the objectives of all concerned.

It is our understanding that the federal requirements allow for discharges from potable water sources. We are requesting that the permits be modified to reflect the federal language. That change to the proposed permit, coupled with efforts of DEP staff and system operators to develop operating procedures that address the Department's concerns, while allowing the flexibility necessary to maintain drinking water quality is, in our opinion, the appropriate course of action.

Response. The Department has concerns about pollutants in these discharges. However, it is recognized that the establishment of appropriate operating procedures and limitations is beyond the scope of this particular general permit. Therefore, the Department has modified the text of the MCGP to reflect the text in the recently expired federal Construction General Permit, in relation to hydrant flushings and potable water sources, which authorized these discharges. These discharges will be authorized under the MCGP until the Department issues a general permit specifically for these discharges.

The following amendment has been made: "(ii) Fire hydrant flushings ~~if released to a vegetated buffer area~~;". The following text has been added to the list of authorized non-stormwater discharges: (vi) Potable water sources including waterline flushings.

A footnote has also been added for these two items that reads:

> This non-stormwater discharge is authorized under this general permit until the Department issues a separate general permit containing requirements specific to this type of discharge, which would replace this authorization.

Comment. Neither the Department nor Maine business has the resources to engage in duplicative activities. There are numerous State regulatory programs that review stormwater and the requirements are not uniform. Maine business should only have to complete one submission to address stormwater controls. (14)

Response. The Department made significant efforts to combine all stormwater requirements for organized areas into Chapter 500, and to provide a single set of standards and submissions for both programs. However, representatives of business interests in the stakeholder process objected that they needed more time to examine and discuss the proposal, and instead urged the Department to develop and issue a separate construction general permit, which entailed separate filing requirements and standards, to authorize discharges for the short term.

It should be noted that standards under state programs such as the Stormwater Management Law, Site Law, and NRPA are generally consistent. Certain projects because of their size, type or location need to meet additional standards. This variation is appropriate.

GENERAL COMMENTS

Comment. The scope of the coverage of the draft CGP must be limited to construction activities that create point source discharges of storm waters to waters of the United States. The MCGP improperly makes a presumption that any ground disturbance of one acre or more will necessarily result in a point discharge to waters of the United States no matter where that activity occurs or what controls are used. (8, 10, 14, 17). By presuming that the ground disturbance results in a point discharge to the United States, the Department unjustifiably broadens the scope of the draft CGP beyond what is regulated under the EPA program, and what the Department's rules allow, and requires Maine construction activities to obtain an extra permit that would not necessarily be required if EPA continued to administer this program in Maine. (10)

The rules seem predicated on an erroneous assumption that any construction activity of one acre or more results in a point discharge. (18)

Response. Although an earlier draft of the MCGP contained a legal presumption that a disturbed area of one acre or more would result in a direct discharge, this legal presumption did not appear in the final draft posted for public comment. A note was included in the final draft providing that the Department has determined that the great majority of construction activities disturbing one acre or more will result in discernable concentrated flows (direct discharges or point discharges) to waters of the state. This is not a legal presumption, but a factual determination based upon conditions in Maine. More information on the subject is set out in the fact sheet.

By dropping the legal presumption, the Department acknowledges that a small minority of sites, as a factual matter, will not result in a direct discharge and so do not require coverage under the MCGP. The most obvious example of this is gravel pit that is internally drained from when excavation first begins. As a practical matter, it is likely not cost effective for a person to undertake the kind of study necessary to effectively determine whether a direct discharge will occur when the result is not obvious, such as with an internally drained site. It is also usually not reasonable, in Maine, to expect that it will not rain until permanent vegetative stabilization measures are well-established. However, if a direct discharge will not occur, a person may proceed without permit coverage. The person is proceeding at his or her own risk, and may be subject to enforcement action for failure to follow the MCGP requirements if a direct discharge to a waterbody occurs.

The MCGP contains basic, good practice requirements designed to help project Maine's water resources. It should be noted that, although a non-point source discharge is not regulated under the MCGP and does not have to meet its requirements, the same types of basic, good practices described in the MCGP are useful in helping to reduce the impacts of these stormwater discharges as well. Pollutants in a watershed move to the water resource (lake, stream or wetland), carried by successive storms. That is what a watershed is. Taking action to minimize pollutants from moving (ex. good erosion control); helping to remove the pollutants from flows (ex. retaining good buffers and not overloading them); and helping to prevent increases in the quantity of stormwater, from construction sites, from overwhelming a stream or wetland all assist in reducing stormwater impacts to Maine's water resources.

Comment. The Department's presumption concerning point discharges violates the spirit, if not the language, of 38 MRSA 341-D, which requires the Department to identify regulatory provisions that are more stringent than federal law and justify the variation. Perhaps more important, we believe the Department's attempt to rely on this presumption is a fundamental revision and expansion of the Department's regulatory authority. Such a significant revision should come through the Legislative process, not through issuance of a general permit.

Response. As mentioned previously, an earlier draft of the MCGP contained a legal presumption concerning one-acre developments, but this presumption was not included in the final draft.

Title 38 MRSA 341-D requires the Department to identify where feasible, in its annual regulatory agenda, if a proposed rule is anticipated to be more stringent than a federal standard. As the comment suggested, this section does not apply to the general permit. The general permit is not a rule.

However, it should be noted that the general permit is being adopted pursuant to rules previously adopted through the full APA process, and following review by the Maine Attorney General's Office.

Comment. As a legal matter, the authority to issue the permit derives from the federal Clean Water Act, Section 402, 33 U.S.C. Sec. 1342, which is a program that regulates point discharges, not nonpoint source discharges to waters of the United States. Maine obtained delegated authority from the U.S. Environmental Protection Agency to administer the NPDES program on January 12, 2001. It is pursuant to this authority that the Department is issuing this MCGP permit to regulate discharges from construction activity.

The NPDES program is clearly limited to regulation of point discharges to waters of the United States. Because this permit is issued to comply with the NPDES program, the Department's

authority should be similarly limited to regulating point discharges to waters of the United States. Further, the Department's own rules make clear that the authority to issue a stormwater general permit applies only to point discharges. Chapter 529(2)(A)(2) authorizes the Department to issue a general permit to regulate "storm water point sources." It does not authorize the Department to use a general permit to regulate nonpoint sources. (10)

Pursuant to the delegation from the United States Environmental Protection Agency (EPA) the State of Maine is authorized to issue federal NPDES approvals. This authority excludes the authority to develop and implement the construction general permit." (14)

Response. The Department's authority to issue the MCGP does not derive from the federal Clean Water Act. Although federal requirements apply to the states, and EPA reviewed Maine's statutes and rules to ensure that they met the minimum federal requirements before authorizing delegation of the NPDES program, the Department's authority to issue the MCGP derives from state law.

As mentioned in previous responses, the MCGP only authorizes point discharges. It is correct that the Department has adopted Chapter 529, which authorizes the Department to issue a general permit for stormwater point discharges (the MCGP). In adopting this provision, the Department limited its broader statutory authority in this area under state law, for purposes of a general permit, to address both direct and indirect discharges to waters of the state under Maine statute. See 38 M.R.S.A. Sec. 413(1).

Federal law does not require that states issue general permits, nor does it prevent it. The alternative is to issue individual permits for each site, which would be far more expensive and time consuming for the regulated community.

Comment. The appropriateness of limiting the coverage of the MCGP to point sources is underscored by the environmental impact of these activities. If a construction activity is designed and implemented in such a way that storm water runoff is dispersed as sheet flow (by use of level spreaders and other appropriate technology), that is exactly the result that the Department wants to achieve and encourage. As a matter of regulatory policy, therefore, it is inappropriate for the Department to encourage permit coverage for those well-controlled construction activities in the same manner as they would require of activities that take no steps to prevent channelization that may result in a point discharge directly to waters of the United States. (10)

Well-designed and implemented construction activities do not result in runoff to water bodies. (8)

Response. As explained in the Fact Sheet accompanying the draft MDGP, sheet flow becomes shallow concentrated flow over a short distance, given conditions in Maine. These discharges are authorized under the MCGP if the standards of the MCGP are met.

It is the treatment of the flow, rather than its form that is important in removing pollutants. Sheet erosion may move significantly more soil from a site than a concentrated flow, because of the area affected. However, it is usually much easier to treat flow that is still in sheet flow rather than in concentrated flow.

Well-controlled construction sites that have been designed to discharge runoff in sheet flow may still discharge significant amounts of pollutants from the site if inadequate erosion controls are present to limit the discharge of washed sediment from the bare soil areas. One of the purposes

of the performance standards is to provide the necessary erosion and sedimentation controls that will limit the discharge of fugitive soil.

Even sites that are well controlled, including good erosion control, will release some pollutants. This discharge is not allowed under federal or state law without authorization. The general permit containing the authorization imposes certain basic, good practice standards to minimize point source discharges.

Comment. To the extent that the Department's goal is to regulate all construction activities of one acre or more in a manner similar to the Stormwater Management Law, the Department must go to the Legislature and seek an amendment to the existing storm water law which contains specific thresholds below which permitting is not required. To seek to accomplish this result pursuant to the MCGP is not authorized or appropriate.

It is requested that the scope of coverage of the MCGP be clearly limited to construction activities that result in point source discharges to waters of the United States, and provide expressly in the permit that construction activities that result only in nonpoint source discharges or discharges not directly to waters of the US are not required to obtain coverage.

Response. The Department has not sought to assert jurisdiction over discharges as provided in the Maine Stormwater Management Law, and the permit is not issued pursuant to that law. Authorization under the MCGP is explicitly limited to direct discharges (point discharges). The Department has used jurisdictional terms (direct discharge, point source) in the MCGP that are already defined in Maine statute and rule, and defined consistently with federal terms.

The first paragraph of the general permit provides: "This general permit authorizes the direct discharge of stormwater…". Although "direct discharge" has the same definition as "point source" under Maine laws, and this was also provided for in the general permit definitions, the Department has made the following change for clarity:

> "This general permit authorizes the direct discharge (point source discharge) of stormwater…".

The term "non-point source discharge" is not as well defined under Maine law. The term has been used in Department programs in the land use area (regulatory and non-regulatory) for many years to refer to all discharges not coming from pipes, i.e., discharges from parking lots, construction sites, material stockpiles, etc., whether or not those discharges met the federal definition of "point source". This is particularly true in the programs applying to small contractors. In order to reduce future confusion, the Department has defined the scope of the MCGP in terms of "point source", which is defined in existing rule, and has tried to limit the use of the term "non-point source".

Comment. In general, this permit is consistent with EPA's draft construction stormwater permit. However, it is significantly less detailed than EPA's permit and requires less planning and record keeping. The limited requirements for planning may lead to inadequate use of erosion and sedimentation control BMPs, and may also increase the burden on the DEP to ensure that developers are appropriately utilizing BMPs to mitigate stormwater impacts. (11)

Response. Early on in the development on the MCGP, the Department decided to take a different approach, in Maine, to structuring a CGP than has historically been done at the federal level. The federal program uses an extensive written CGP. It includes education material and a great deal of

text that suggests but does not require particular actions. There is an extensive planning requirement, but the plan does not need to be reviewed for sufficiency.

The Department decided that this approach, which heavily favors paperwork requirements, but is very unclear as to what actually needs to happen on the ground on a site, was not appropriate in Maine. Instead, the Department decided to model the MCGP process after the "permit by rule" approach that has been used successfully under the Natural Resources Protection Program. This approach was considered more environmentally protective, less expensive for the regulated community to implement, and easier for the Department to effectively administer. The Department's experience with the permit by rule program is that, particularly for small sites, the regulated community has wanted standards to be provided in a format this is brief, clear, and presents only the most important information related a particular project. If the requirements are presented in this way, they are more like to be read and followed.

With the support of the Environmental Protection Agency, the Department substituted a short list of enforceable performance standards, and an ESC plan where most needed, for the extensive SWPPP requirements in the federal CGP. The Department believes that more environmental protection will result from giving developers and contractors a short list of practical and important performance standards, and working to help them get those implemented on the ground, than requiring the development of extensive but unreviewed plans. Where plans are required, the Department considered it important to have the plans certified for sufficiency by knowledgeable persons. If the plans are not done adequately, they are not worth doing. Where projects drain to impaired waterbodies, the plans must be approved by the Department.

This approach results in a system where it is clearer what is expected on the ground, and where both the contractors, and the Department's scarce resources should be put. The performance standards address substantive issues and are enforceable, helping to create a level playing field of basic good practices. This provides for better environmental protection.

Comment. We are concerned by the complete lack of reference to the Endangered Species Act in the draft general permit. EPA's draft permit contains extensive references to the endangered species act, and even has a complete appendix detailing steps to take to ensure that a particular project will not jeopardize endangered species. The Department is urged to rectify this omission. Stormwater discharges from construction activities must not be allowed to threaten endangered species, and DEP must develop a process to ensure this. (11)

In issuing this general permit, the Department must comply with all of its consultation requirements with the U.S.Fish and Wildlife Service and the National Marine Fisheries Service. In addition, general permits should not be used under any circumstances to authorize discharges to waters known to support populations of threatened or endangered species. Individual permits should be applied for and considered where a discharge is into a waterbody that protects endangered species. (9)

Response. The EPA is required to ensure that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat. See 40 CFR 122.49. However, not all NPDES requirements applicable to EPA's permitting program apply to state delegated programs. Title 40 CFR 123.25 lists the provisions which state programs must have authority to implement. Title 40 CFR 122.49 is not included in this list.

The Department included a provision in the MCGP that requires any construction activity occurring within an essential habitat to obtain written approval of the activity from the Department of Inland Fisheries and Wildlife (IF&W) prior to filing an NOI. The provision is based upon a statutory requirement in Maine (state law) that a state agency may not license a project that will significantly alter the habitat of any species designated as threatened or endangered, or violate protection guidelines, without a determination from IF&W. See 12 MRSA § 7755-A.

The Department has retained the authority to require an individual permit.

In responding to this comment, the Department reviewed 12 MRSA § 7755-A, and found that the language in the draft MCGP was not consistent with the statute. The statute provides that:

§7755-A. State and local cooperation

1. Review. A state agency or municipal government shall not permit, license, fund or carry out projects that will:

A. Significantly alter the habitat identified under section 7754, subsection 2 of any species designated as threatened or endangered under this subchapter; or

B. Violate protection guidelines set forth in section 7754, subsection 3.

The commissioner shall make information under section 7754 available to all other state agencies and municipal governments for the purposes of review.

2. Variance. Notwithstanding subsection 1, state agencies and municipal governments may grant a variance from this section provided that:

A. The Commissioner of Inland Fisheries and Wildlife certifies that the proposed action would not pose a significant risk to any population of endangered or threatened species within the State; and

B. A public hearing is held on the proposed action.

3. Pending applications. Notwithstanding Title 1, section 302, applications pending at the time of adoption of habitats and guidelines under section 7754, subsections 2 and 3 shall be governed by these provisions.

The Department has made the following change to the MCGP in order to make the text consistent with the statutory requirement.

For any construction activity occurring within an essential habitat or that may violate protection guidelines, written approval of the activity from the Department of Inland Fisheries and Wildlife (IF&W). The applicant must follow any conditions stated in the IF&W approval.

For more information on essential habitat and protection guidelines, see http://www.state.me.us/ifw/wildlife/endangered/habitat/esshab.htm

Comment. EPA's permit contains a detailed description of penalties for non-compliance. DEP mentions no penalties for non-compliance and does not describe how it will enforce this permit. The permit would benefit from discussion of both enforcement mechanisms and penalties for failure to comply. (11)

Response. It is not necessary for the Department to address penalties or enforcement mechanisms in the general permit, as the Department's authority is established in statute and rule. However, if the Department determines in implementing the program that a provision on this issue would be helpful, it may be included in a future general permit.

Comment. We wanted to assure that you are aware of the Ninth Circuit decision with respect to the Phase II Rule. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, No. 00-70014 (9th Cir. Jan. 14, 2003), the Ninth Circuit held that the EPA's failure under the Phase II scheme to require review of notices of intent ("NOIs"), which the court found to be the functional equivalent of permits under the Phase II General Permit option, and to make the NOIs available to the public or subject to public hearings violate the Clean Water Act ("CWA"). The court remanded these aspects of the MS4 program to give EPA an opportunity to correct these deficiencies.

Given the similarities between the EPA Phase II program and the Maine Department of Environmental Protection's (the "Department" or "DEP") draft permit for the discharge of stormwater from small construction sites, we believe that the Department ought to carefully review the Ninth Circuit's decision and its draft permit to determine whether or not Maine's permitting scheme is similarly flawed. For example, the DEP may wish to revisit the following features of the permit in light of the recent court decision. First, under the permit each permittee must submit an NOI, but there are no procedures in place to notify the public of the filing of NOIs. Second, there is no opportunity built into the permitting process for the public to comment on ESC plans, which contain the substantive information about how the permittee will control the discharge of stormwater from the site. Third, according to the permit, the DEP is not planning to review ESC plans for construction activities that do not occur in impaired watersheds.

In order to comply with the CWA, DEP should consider adopting the following measures: (1) send notice of the filing of NOIs to the usual NPDES notice list; (2) provide the public with a meaningful opportunity to review and comment on NOIs and ESC plans; and (3) review all ESC plans internally for compliance with the permit. (9)

Response. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, the court specifically focused on the MS4 permit and the similarity of its NOI to an individual permit application, in explaining why the existing process was deficient. The same reasoning does not as easily apply to the NOI under the MCGP, which contains specific performance standards in the general permit. However, the Department will follow legal developments in this area with interest, and comply with any applicable changes to NPDES requirements.

In considering how better to ensure that ESC plans are adequate, considering comment (3) above, the Department has clarified, in Part III(A), that ESC plans are intended to demonstrate how the standards in Appendix A will be met. Text has also been amended to make clear that an ESC plan is also required under the general permit for a Site Law development, although to the extent the an ESC plan submitted with the Site Law application is consistent with Appendix A, it may be referenced.

Comment. In order to help assess the impact of the program, the Department should publish on an annual basis a detailed description of each instance of construction site non-compliance, including to, but not limited to the location of the site, the identity of the owner and operator, the nature and extent of the non-compliance, the actions taken to bring the site into compliance, the results of those actions, and a statement as to whether the non-compliance has stopped or is continuing (and, if continuing, the reasons therefore and the permittee's plan to achieve compliance). (9)

Response. The Department will periodically assess compliance with the MCGP. While publishing an annual assessment of compliance with the MCGP would provide useful information, the Department cannot commit to this activity given the resources available for this program.

Comment. Much of the permit is predicated on the assumption that erosion and sedimentation control BMPs are highly effective and can actually eliminate the discharge of pollutants from construction sites. This permit implies that no discharge will occur to non-attainment waterbodies if BMPs are utilized during construction activities. However, DEP has noted that even if used correctly, BMPs are very unlikely to eliminate the discharge of pollutants. Therefore, it is uncertain how the DEP can claim that any construction activity meeting the standards of this general permit will not cause or contribute to a violation of water quality standards. (11)

Response. Even if appropriate BMPs are used during construction, a discharge of pollutants will still occur. The MCGP is not intended to imply that all discharges can be prevented through the use of BMPs on construction sites. However, a discharge from a project that meets the standards in the MCGP is considered de minimis and will not cause or contribute to a water quality violation. If the Department is concerned that the discharge from a specific project will not be de minimis, and may result in a violation of water quality standards, it can require the project to obtain an individual permit.

Comment. Projects have the potential to cause non-point source pollution, and it can be controlled using good Best Management Practices (BMPs). The best BMPs minimize exposure of the soil to runoff and disperse flows from project sites through natural and constructed buffers. Our principle means of doing this has been through vegetated buffers. Now, the message from DEP is that no controls can prevent point source runoff from construction projects. This undermines the philosophy and principles of good erosion and sediment control planning and design. (17)

Response. The fact that ESC BMPs are not perfect, in the sense of preventing all discharges in practice, does not reduce their utility. BMPs minimize the discharge of pollutants, some more effectively than others. Note that the MCGP requires the retention of downgradient buffers where practicable.

Comment. The DEP has not proposed any numeric standards for discharges from construction sites or a mechanism to monitor the actual discharges from construction sites for values of TSS, BOD, nutrients, metals, and other contaminants that might affect water quality. Similarly, DEP has not developed any parameters that measure the impacts of water quantity, which would likely increase due to construction activities, on receiving water. (11)

Response. The DEP has taken a performance standard/BMP approach to this construction general permit. The MCGP requires sites to be regularly inspected, and problems fixed. It is felt that this is an effective approach to regulating these sites, while being less onerous than requiring monitoring of pollutant levels in individual discharges. The Department agrees that construction sites can act as impervious area, and increase quantity flows to waterbodies. However, impacts from construction sites tend to be of limited duration. The Department is more concerned with the long-term quantity and quality impacts of post-construction stormwater discharges on waterbodies, and feels that numeric standards are more appropriate for these discharges than for

construction sites. The Department will be examining requirements related to these discharges in the coming year.

Comment. We believe it is important for the Department of Environmental Protection (the "Department" or "DEP") to clearly articulate the rationale for promulgating this general permit. The effectiveness of this general permit will depend in large part on the willingness of those conducting land disturbing activities to voluntarily adhere to the terms of the permit. It can be expected that many people engaging in these types of construction activities will view this general permit as an onerous regulatory burden and will fail to appreciate the benefits of keeping sediment and other pollutants out of the State's waters. For this reason, the DEP should attempt to use the general permit itself as an opportunity to educate the public regarding the impacts of polluted stormwater runoff. Although the introductory section of the fact sheet includes information on the regulatory background for the issuance of the permit, there is nothing in the permit or in the fact sheet that spells out the environmental and economic reasons for controlling these types of discharges.

The permit should include specific findings explaining how erosion and sedimentation from construction sites can lead to reduced water quality and other environmental degradation. For example, the permit might elaborate on the following points:

- Stormwater runoff is one of the leading threats to the public health and the environment.
- When it rains or snows, the water that runs off of construction sites can wash sediment and other pollutants into nearby streams and waterways.
- The discharge of these pollutants fills in waterways with sediment, scours smaller stream channels and deposits sediment that destroys fish habitat.
- According to EPA, the discharge of sediment has been identified nationwide as the single largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes. (9)

Response. The Department agrees that providing public education and information on the impacts of stormwater runoff is important. However, this can be done in other ways than through adding additional material to the MCGP itself.

Comment. We believe that the Department should look to the EPA's draft NPDES General Permit for Discharges from Large and Small Construction Activities ("EPA's General Permit") and include more information relating to the erosion and sedimentation control techniques where appropriate.

As discussed above under comment no. 1, we believe that to ensure the success of this permitting program, it is essential not only to properly explain in the text of the permit itself why the permitting program is necessary, but also to lay out the important techniques for controlling the discharge of sediment. For example, in EPA's General Permit, EPA explains the relationship between sediment and erosion controls. The permit states that: "Erosion controls provide the first line of defense in preventing off-site sedimentation and are designed to prevent erosion through protection and preservation of soil. Sediment controls are designed to remove sediment from runoff before the runoff is discharged from the site. Sediment and erosion controls can be further

divided into two major classes of controls: stabilization practices and structural practices." *See* EPA General Permit, Proposed Fact Sheet, p. 8.

In addition to including more background information, the draft general permit ought to include descriptions regarding erosion and sedimentation control techniques that currently do not appear in the draft permit. Further, the draft permit should also provide more complete descriptions of these techniques for educational purposes. Although DEP's draft permit refers the reader to the Maine Erosion and Sediment Control Handbook for Construction, we believe it would be worthwhile to provide additional information in the body of the permit. The following two paragraphs taken from the EPA permit describe techniques that are not found in Maine's permit and also demonstrate how EPA has made more of an effort to include more complete descriptions of these techniques. *See* EPA General Permit, Proposed Fact Sheet, p. 9.

- Preservation of Trees. This practice involves preserving selected trees already on-site prior to development. Mature trees provide extensive canopy and root systems which protect and hold soil in place. Shade trees also keep soil from drying rapidly, decreasing the soil's susceptibility to erosion. Measures taken to protect trees can vary significantly, from simply installing tree armor and fences around the drip line, to more complex measures such as building retaining walls and tree wells. Along with the erosion benefits provided by trees, they can also add to the aesthetics and value of the property.

- Contouring and Protection of Sensitive Areas. Contouring refers to the practice of building in harmony with the natural flow and contour of the land. By minimizing changes in the natural contour of the land, existing drainage patterns are preserved as much as possible, thereby reducing erosion. Minimizing the amount of regarding done will also reduce the amount of soil being disturbed. The preservation of sensitive areas at a site such as steep slopes and wetlands should be a priority. Disturbance of soil on steep slopes should be avoided due to vulnerability of erosion. Wetlands should be protected because they provide flood protection, pollution mitigation, and an essential aquatic habitat.

The general permit itself presents an opportunity to educate the public and potential permittees regarding the importance of this program to the State, and we strongly encourage DEP to take full advantage of the opportunity. (9)

Response. The Department agrees that public education is very important. However, it does not believe that including this material in the MCGP will have the desired effect. A great deal of material on techniques and BMPs is available from a variety of sources, and the Department is developing additional guidance. The MCGP includes a performance standard requiring that disturbed areas be minimized to the extent practicable.

Comment. We are concerned about the limited measures included in the draft permit for protecting Maine's impaired waters. The following additional measures should be included to ensure compliance with permit requirements.

Burden on the Permittee. The general permit should make clear that for new or expanding discharges into already impaired waters, the permittee must be able to make an affirmative demonstration to the Department that they will not cause or contribute to existing violations. This required demonstration must specifically identify measures and BMPs that will collectively control the discharge of the pollutants of concern. In addition, the public should have an opportunity to review and comment on ESC plans for impaired waters.

Required Monitoring for Discharges to Impaired Waters. One of the most effective ways of protecting already stressed waters from these types of land disturbing activities is to establish monitoring requirements. Prior to conducting any land disturbing activity, the permittee that discharges in an impaired watershed should be required to submit a monitoring plan with his ESC plan. The monitoring plan should include the following requirements:

(a) The permit should require that rainfall or snowfall data be recorded daily.
(b) The permittee should be required to sample all receiving waters, all outfalls, or a combination of receiving waters and outfalls.
(c) The permittee should be required to sample in accordance with the monitoring plan at least once for each rainfall event greater than or equal to 0.5 acres.
(d) All sampling should be collected by grab samples, and the analysis of these samples should be conducted in accordance with methodology and test procedures established by 40 C.F.R. Part 136.
(e) Permittees should be required to submit monitoring results on a monthly basis.
(f) Permittees should be required to maintain records of monitoring activity for at least five years.
(g) The monitoring plan should be prepared by a licensed professional in the fields of engineering, landscape architecture, forestry, geology, or land surveying.

By adopting these additional provisions with respect to land disturbing activities occurring in impaired watersheds, the Department and the public will be [in a better] to prevent the further degradation of already impaired waterbodies. (9)

Response. Concerning burden of proof -- The Department is basing its issuance of the general permit on the presumption that if projects are conducted in accordance with the standards in the MCGP, most of the projects will not cause or contribute to water quality standards. Although it is true that some pollutants will leave a site, even with good erosion control measures, these are expected to be de minimis if the standards are met in most cases. The Department has the authority to require monitoring, as well as the authority to require an individual permit if necessary.

The NOI system being used is based upon the NRPA Permit by Rule system. The Department's applications are public so anyone can come in and look at the file/NOI during or after processing. The Department forwards a copy of the NOI form to the appropriate municipality. The Department accepts comments in writing or via email. However, no public notice is required with an NOI (or a PBR with a 14-day review period), so someone would have to know about the filing. The Department is expecting to seek a rule change to allow for more review time when an ESC plan is filed with the Department.

Concerning monitoring -- It is important that construction activities conform with basic good practice to minimize disturbed areas, keep sites stabilized, practice good housekeeping measures, and install designs intended to minimize long-term erosion problems. Note that large projects in areas outside LURC jurisdiction may be subject to additional restrictions through the Stormwater Management Law or Site Law.

Rather than requiring submission of a monitoring plan and monitoring data, the Department is relying upon the performance standards for inspection contained in the appendices. It is felt that good, regular site inspections, followed by corrective work where necessary, are more important to preventing problems for this type of activity than requiring monitoring. Construction activities

are generally short-term, temporary impacts, and the cost of the type of monitoring described, across the board, is normally not justified relative to the expected environmental gain. The Department has the discretion to require monitoring, as well as the discretion to require an individual permit, on a project by project basis.

Comment. The DEP should consider adopting buffer zone and impervious surfaces requirements where appropriate to further protect receiving waters. (9)

Response. The performance standards in the appendices to the MCGP require that downgradient buffers be retained to the extent practicable. An impervious area restriction would be more relevant to standards addressing post construction discharges, although the Department acknowledges that the temporary stripped areas in construction sites may behave as impervious areas.

Comment. Would the DEP please clarify as to whether the Maine State Constitution Article IX, General Provisions, Section 21 and/or Title 30-A, Section 5685 applies to the proposed Stormwater regulations? Also, if these regulations were to need Legislative approval, would they be considered to be a mandate and therefore require 2/3 vote in each body of the Legislature? (16)

Response. Maine State Constitution Article IX, General Provisions, Section 21 states (in part) that "the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government."

Title 30-A, §5685, in part, provides additional direction on the interpretation and implementation of Maine State Constitution Article IX, General Provisions, Section 21.

The MCGP is not a regulation and does not create a state mandate. State law already exists that makes it unlawful for an entity to discharge pollutants to waters of the State without first obtaining a license from the Board of Environmental Protection (Title 38 MRSA Section 413). When a municipality chooses to conduct an activity that triggers the requirements of State law, it must comply with those requirements. In the case of regulated stormwater discharges, the requirements include obtaining a license for the discharge. The MCGP and MS4GPs may be used in lieu of obtaining individual permits.

Comment. The January 12, 2001 delegation of the NPDES program to the State did not include Indian country. This lack of permitting authority could potentially limit construction stormwater discharge permitting within that territory. Will the apparent inability for Maine to issue discharge permits within this region be resolved by the March 10, 2003 date? (3)

Response. No. The MCGP provides that the general permit "applies in those parts of the State of Maine for which the Department has received delegated authority under the federal NPDES program." For point stormwater discharges from construction activities, it is unclear what the appropriate permitting authority is.

Comment. Including forest road and forest management into the Storm Water Discharge permitting process unnecessarily increases the cost of doing business for forest landowners and loggers.

Response. Permit requirements related to silvicultural activities are established in rule at 06-096 The text in the MCGP mentioning silvicultural activities (Part VI(D)) merely references this regulatory language.

Reference: Chapter 521 -- http://www.state.me.us/dep/blwq/docstand/c521a.pdf

Chapter 521 addresses silvicultural activities. Certain types silvicultural activities are defined in rule as non-point source. The MCGP does not regulate or authorize non-point source discharges. Chapter 521(10)(b)(1) provides in part (emphasis added):

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the State. *The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

Comment. We understand that silviculture activities will not be regulated under this draft construction general permit. Please confirm in your response to comments, that consistent with federal and State regulations, silvicultural activities such as harvesting operations, site preparation, reforestation, and construction and maintenance of land management roads are not required to obtain coverage under this draft permit. (8)

While we understand that silvicultural point source discharges such as rock crushing, log sorting and storage facilities, and construction at existing or new industrial facilities that result in point source discharges will be required to obtain coverage under this permit, it is our understanding that you agree that nonpoint source activities such as harvesting and land management roads do not require such coverage. (10)

Response. The distinction between silviculture point and nonpoint discharges is correct in regards to regulation under the MCGP. Please see last comment and response.

Comment. We understand that in the draft, timber harvesting, forest management, road building for forestry purposes and similar activities will not be affected. We support this position and are hopeful that no changes occur following the comment period. Forestry activities are currently heavily regulated through a number of different agencies and administrative levels of government. We feel that current regulations are providing excellent protection for the water resources of Maine. To have forestry activities come under the CGP would, we believe, provide no additional protection but would create an unwarranted burden on the forest industry. (7)

Silvicultural activities to include timber harvesting, site preparation, reforestation and construction and maintenance of land management roads should not be regulated under the construction general permit. (6)

Response. The text in the MCGP has not been changed.

Comment. A series of sketches showing typical scenarios would be helpful and provide clarification to some questions. As the Shoreland Zoning Citizen's book by DEP shows -- "a picture is often worth a thousand words."

It would also be helpful if a workbook guide was developed as a guide to help people through the regulations. (2)

Response. The Department is in the process of developing supplemental materials for this program. These comments will be kept in mind.

Comment. Maine regulates nonpoint stormwater discharges, under 38 MRSA 420-D. It is significant that in the subsection entitled "Relationship to other laws" the statute does not reference the waste discharge law (38 MRSA 413). Thus, the Legislature has made it explicit that stormwater approvals are only required for projects which meet the jurisdictional authority of 38 MRSA 420-D and are not expressly exempted by subsection 7.

Response. The Department does not agree with this statutory interpretation. The Maine Stormwater Law does not use the terms "nonpoint" or "point" discharges, and so it is incorrect to say that Maine regulates nonpoint sources under this law. The Maine Stormwater Management Law regulates all stormwater from certain types of developed areas. The Maine Stormwater Management Law does not limit the Department's authority under 38 MRSA 413.

Comment. A list of what is considered stormwater would be helpful. The Construction General Permit gives a list of what is "non-stormwater discharges." (2)

Response. Stormwater is defined in Part II(J) as:

> **"Stormwater.** "Stormwater" means storm water runoff, snow melt runoff, and surface runoff and drainage. "Stormwater" has the same meaning as "storm water"."

This definition is consistent with that used in the federal program, and the Department feels it is acceptable for use in the MCGP. However, additional descriptive material in supplemental materials would probably be helpful, and the comment will be kept in mind. The federal and state general permits list non-stormwater discharges, but not for purposes of clarification. They authorize certain non-stormwater discharges typically related to construction activity.

CLARIFICATIONS

1. In Part III(B), (1)(a), made the following correction, to make the language consistent with (b):

> **1. Site Law, Stormwater, or LURC.** A common plan of development or sale is considered to meet the requirements of this general permit if:
>
> a. A Site Law, Stormwater (38 M.R.S.A. § 420-D), or LURC permit is <u>required</u> ~~obtained~~, and the requirements of Part III (A)(2) are met; and
>
> b. If a Stormwater permit is required, the requirements of Part III(A)(2) are also met on all associated lots in the subdivision, as determined by the Department.

2. In reviewing the questions and comments received, and the draft MCGP, it became obvious that although it was clear when a project disturbing one acre or more of area needed an ESC plan, it was not clear when a common plan of development or sale needed one (for example, a subdivision in LURC jurisdiction). Under the general permit, a subdivision development can

trigger the need for an NOI in one of two ways (or both), and an ESC plan is required for some of those developments. An NOI is required if (1) the developer himself creates one acre or more of disturbed area, or (2) a municipal or LURC subdivision is created that requires a LURC, Site Law, or Stormwater Management permit. This ESC plan issue was clarified with the addition of the following language:

> An ESC plan is required if the common plan of development or sale drains to an impaired waterbody (C) and a Site Law, Stormwater Management, or LURC permit is required for the project. An ESC plan is required if the common plan of development or sale does not drain to an impaired waterbody (C) but will result in 3 or more acres of total disturbed area, and a Site Law, Stormwater, or LURC permit is required for the project. Total disturbed area includes expected disturbed area on lots as well as associated facilities such as roads, pads, and ponds. The department will assume that one acre of disturbed area will be created per 3 lots (1/3 ac. per lot), unless the person proposing the common plan of development or sale provides information concerning actual disturbed area.

This approach is consistent with the common plan (3 lot) threshold, which is based on the assumption specified in the fact sheet that a 3 lot subdivision will, conservatively speaking, result in at least 1 acre of disturbance. This approach is also consistent with the limitation expressed by the Department during at least one public information meeting on the draft MCTP, indicating that the NOI requirement didn't apply to a "common plan of development or sale" unless another state permit (Stormwater, Site, or LURC) was also needed. Lastly, the approach is consistent with the Part IV(B) NOT requirements, that require the developer to inform lot buyers about any ESC plan requirements. Note that if an NOI is not required, an ESC plan is not required.

3. Part IV(A)(1), footnote 6. Deleted footnote 6. It conflicted, in part, with a provision in the text of Part IV(A) that provided for the extension of the review period when applications were consolidated. This extension is provided for in Chapter 2 of the Department's rules. The footnotes also had information concerning possible future rulemaking, which is not a necessary part of the MCGP.

4. In several sections, the Department has converted "effective date of general permit" and the "90 day after effective date of general permit" provisions to specific dates. Ninety days from March 10 is June 8, a Sunday. Therefore, the date of June 9, 2003 has been used.

Also, in the "Phase II" provision, the date of April 17, 2003 has been extended to June 9, 2003. This has been done to simplify the process by having one important date for projects with authorized discharges, and to allow additional time for the regulated community affected by Phase II to become aware of the filing requirement. The section has also been clarified to specify that the filing requirement for a Phase 2 activity applies without regard to whether the project is completed prior to June 9, 2003. This is consistent with the federal requirements that NOIs are required for projects after March 10, 2003.

5. In Part I, the effective date of the general permit has been changed to March 10, 2003.

6. In Part IV(A)(1)(a), the following language has been deleted, because the Department has determined that the 30 day review period conflicts with existing rules. The Department may seek a rulemaking to make the 30 day review period possible in the future. If such a change were made, it would be incorporated into the general permit upon reissuance.

~~If an erosion and sedimentation control plan is required (see Part III) and is submitted to the Department for review, the approval period is 30 calendar days from receipt of the NOI rather than 14 calendar days. If the Department does not approve or deny the application (with ESC plan) within the 30 day period, the application (with ESC plan) is deemed approved by the Department.~~

7. Part IV(A)(1)(b). Made the following changed as follows:

Activities that ~~are part of a larger project requiring~~ require a permit under the Site Location of Development or the Storm Water Management Acts may not proceed until any required permit under those laws is obtained.

The previous text was confusing, because the activity may not be part of a larger project -- it may be the same project.

8. In Part IV(B), the following change has been made:

a. For areas of the site over which the developer has control, the NOT must be filed ~~A~~after permanent stabilization has been completed~~.; or~~

b. For areas over of the site over which the developer does not have control (ex. lots sold in an undeveloped or partially undeveloped state, the NOT must be filed a~~A~~fter (i) temporary stabilization including perimeter controls for individual lots have been completed if the developer has done prep work (stripping or grading) on the lots, (ii) the developer has informed the lot buyers of the requirements of this general permit, and (iii) the developer has provided the buyers with copies of any erosion control plan, or portion of a plan applicable to the lots, required to be certified or provided to the Department under the requirements of this general permit.

This change was made because, as previously written, the provision required a subdivision developer to either complete permanent stabilization, or to install temporary stabilization including perimeter control for individual lots. This is not always reasonable when undeveloped lots are sold. An undeveloped lot might not be developed for many years, or the developer might not be aware of what part of the lot would be developed by the buyer.

9. Part V(K). A reopener clause was added that references the applicable statutory provision.

LIST OF COMMENT DOCUMENTS RECEIVED

#	**Name**	**Company or Representation**
1	Favreau, Y. Leon	Bethel Furniture Stock Inc.
2	Milligan, Tom (#1)	City of Biddeford
3	Coffin, Wendy and Paul Porada	Woodward & Curran
4	Brandt, David	Dept. of Defense, Veterans and Emergency Management, Military Bureau
5	Arne, Mike	Paradigm Engineering
6	Flood, Pat	International paper
7	Lehner, James K.	Plum Creek
8	Medina, Sarah J	Seven Islands Land Company

9	DeScherer, Christopher K.	Conservation Law Foundation
10	Geoffroy, Kate	Maine Forest Products Council and the Maine Pulp & Paper Association
11	Bennett, Nick	Natural Resources Council of Maine
12	Newman, Sharon	Maine Turnpike Authority
13	McNelly, Jeffrey	Maine Water Utilities Association
14	Davis, Virginia E.	Maine Turnpike Authority
15	Earley, Kathy	City of Portland, Dept. of Public Works
16	Kirsten Hebert	Maine Municipal Association
17	Christine Olson	Maine Department of Transportation
18	Jason Folsom (sent by Ted Johnston)	Maine Aggregate Association

Appendix

The following attachment is a copy of the draft MCGP showing changes in underline/strike.